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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73- 73-2002

THE PHILADELPHIA HOUSING AUTHORITY, GILBERT STEIN and THOMAS J. KELLY, Individually and in Their Capacity as Past and Present Executive Directors of The Philadelphia Housing Authority; THOMAS McINTOSH, JAMES NOLAN, CARMELITA LARNER, FROSTEENA KEE, and WILLIAM RAFSKY, Individually and in Their Capacity as Members of The Philadelphia Housing Authority,

Petitioners,

v.

BRENDA ALDERMAN, FLOYD SMITH, JERRI WILLIAMS, and KAY DEMING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73- .

THE PHILADELPHIA HOUSING AUTHORITY, GILBERT STEIN AND THOMAS J. KELLY, INDIVIDUALLY AND IN THEIR CAPACITY AS PAST AND PRESENT EXECUTIVE DIRECTORS OF THE PHILADELPHIA HOUSING AUTHORITY; THOMAS McINTOSH, JAMES NOLAN, CARMELITA LARNER, FROSTEENA KEE, AND WILLIAM RAFSKY, INDIVIDUALLY AND IN THEIR CAPACITY AS MEMBERS OF THE PHILADELPHIA HOUSING AUTHORITY,

Petitioners,

v.

BRENDA ALDERMAN, FLOYD SMITH, JERRI WILLIAMS, AND KAY DEMING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Philadelphia Housing Authority, Gilbert Stein, Thomas J. Kelly, Thomas McIntosh, James Nolan, Carmelita Larner, Frosteena Kee, and William Rafsky (collectively "PHA") hereby petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on April 16, 1974.

I. OPINIONS BELOW.

The opinion of the District Court is reported at 365 F. Supp. 350, and is printed in Appendix A hereof, pp. A1-A21. The opinion of the Court of Appeals is not yet officially reported but is printed in Appendix A, pp. A24-A68.

II. JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on April 16, 1974, Appendix A, pp. A22-A23. The jurisdiction of this Court to review the judgment upon Writ of Certiorari is invoked under 28 U. S. C. § 1254 (1).

III. QUESTIONS PRESENTED.

This Petition raises the issues of the extent of the constitutionally permissible power of a state agency to restrict its employee's political activity and campaigning contrary to substantial, admitted public interests of the employing agency, and the scope of a public employer's power to discharge non-tenured employees for failure to agree to abide by such restrictions. Within the framework of this case, therefore, the following questions are presented:

1. Whether a governmental employer's discharge of public employees for refusal to agree to abide by a restraint on political activity and discussion, limited to one political campaign and supported by admitted, substantial and compelling public interests is permissible under the first and fourteenth amendments of the United States Constitution?

2. Whether a public employer may constitutionally prevent political conflict within a governmental agency for the purpose of protecting the integrity of, and preserving confidence in, the public service, by restraining the political activities and political speech of its employees?

3. Whether employees of a state agency, who, as a matter of state law, have no legitimate claim to job tenure, have a property interest in continued employment protected by the procedural aspects of the due process clause of the fourteenth amendment of the United States Constitution?

IV. CONSTITUTIONAL PROVISIONS AND RULES OF CIVIL PROCEDURE INVOLVED.

1. United States Constitution.

a. Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

b. Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Federal Rules of Civil Procedure, Rule 52(a).

FINDINGS BY THE COURT.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for the purposes of

review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

V. STATEMENT OF THE CASE.

A. Factual Background.

The facts of this case are established by eighty-one numbered findings of fact ("FF"), made by the District Court after a full evidentiary hearing (App. A26-A42). The Court of Appeals did not hold any such finding "clearly erroneous" nor otherwise disturb any facts found by the District Court. All such findings of fact must, therefore, be deemed admitted by the Court of Appeals as well as for purposes of this Petition. Federal Rules of Civil Procedure, Rule 52(a). The admitted facts of this case, therefore, are as follows:

In the summer of 1972, a substantial controversy existed between PHA and the Resident Advisory Board of Philadelphia, Inc. ("RAB") as to whether RAB truly and properly represented the interests of PHA tenants, as it purported to do (FF 12, App. A29). On August 21, 1972, Petitioner Gilbert Stein became Executive Director of PHA. Among the first duties given to Stein by the Members of PHA, was to investigate the claimed representative status of RAB (FF 6, 13, App. A28, A29).

During his investigation, including visits to PHA housing projects and personal interviews, Stein discovered that many tenants believed that RAB not only did not properly represent them, but also that it was conspiring with PHA to exploit tenants for the benefit of RAB (FF 14, 15, App. A29-A30). Stein found this conclusion confirmed to many tenants by the stated refusal of RAB to deal with the very serious narcotics problem in PHA housing projects, the conviction of the president of RAB for extortion, and the fact that some members of the governing board of RAB were not tenants of PHA (FF 15, App. A29-A30).

As a result of Stein's investigation, it was determined, in October 1972, that an election would be held

among tenants in December, 1972, to determine fairly and finally whether PHA's tenants really desired RAB to represent them in their dealings with PHA (FF 16, App. A30).

Because of his experience during the investigation, Stein knew that campaigning in the election by PHA employees would work to the serious detriment of PHA and its tenants, many of whom were dependent upon the social services administered by PHA employees. If employees campaigned in any manner, the tenant would be subject to considerable coercion, either intentional or unintentional, to vote in accordance with the wishes of PHA employees (FF 19(d), App. A32). Experience had also shown that most PHA employees would campaign against RAB, which might lead to violence (FF 17, 35, App. A30, A37).

Stein believed that it would be impossible to conduct a fair election if PHA employees were permitted to campaign in any manner, and that such campaigning would substantially erode tenant and public confidence in the integrity of PHA (FF 19, App. A31-A33). Stein also believed that RAB would attempt to enjoin the election, and that it was imperative that PHA employees maintain a neutral position so as not to influence any such litigation (FF 17, App. A30). It was therefore necessary to dispel the fears of the tenants and insure that PHA not only conduct a free and open election but that it appear to do so.

To achieve this goal, Stein directed, in November 1972, that following memorandum ("the Memorandum") be issued to all PHA employees:

> To: All Employees of The Philadelphia Housing Authority
>
> From: Gilbert Stein, Executive Director
>
> Subject: Activities of PHA Personnel during the Tenants Election

No PHA employee shall engage in any form of interference during the upcoming tenant plebiscite to determine whether residents of PHA-managed properties want to be represented by the RAB Corporation (Resident Advisory Board of Philadelphia).

It is the policy of this Authority to encourage all tenants to exercise their right to choice . . . but there should be no attempt by PHA employees to discuss RAB politics with tenants, either pro or con.

Any employee who engages in such activity will be subject to immediate dismissal.

/s/ Gilbert Stein

I have read the above and understand that as an employee of The Philadelphia Housing Authority, I must abide by this restriction.

.....
Employee's Signature
(FF 18, App. A30-A31)

Stein directed that all employees, without exception, be given the Memorandum, sign it, and comply with its terms (FF 18, 22, 38, App. A30-A31, A33-A34, A38). The records of PHA show that, of approximately 1,300 employees, all signed and returned the Memorandum except for approximately 65 people, many of whom were on sick or annual leave (FF 23, 24, App. A34). The records further show that only the four Respondents herein refused to sign the Memorandum (FF 38, App. A37).

On December 5, 1972, RAB, as anticipated by Stein, filed suit in the United States District Court for the Eastern District of Pennsylvania seeking to enjoin the election; *Resident Advisory Board of Philadelphia, Inc., et al. v.*

Philadelphia Housing Authority, et. al., Civil Action No. 72-2399 ("the RAB case") (FF 20, App. A33). As a result of that action, RAB and PHA entered into a Stipulation, approved by the Court, postponing the election and providing, in part:

> The Philadelphia Housing Authority agrees that it will not take a position on the election provided for above. This shall not prevent PHA from answering any criticism of its personnel or policy (FF 21, App. A33).

On May 9, 1973, the Honorable Charles R. Weiner entered an Order in the RAB case which reaffirmed the above portion of the previous Stipulation and provided:

> Neither through "The Good Neighbor" or any other written or published notice or statement, nor through any oral statement issued or made in any manner by the Philadelphia Housing Authority or any of its employees, shall the Housing Authority make known or otherwise publish to the public housing tenants its opinion or preference as to the persons or organizations which shall represent the public housing tenants or their dealings with the Housing Authority. Nor shall the Housing Authority offer any promise or benefit to any person for the purpose of influencing any eligible voter on how he shall cast his vote (FF 33, App. A37).

Respondents were non-tenured employees of PHA, each of whom had signed, upon entering their employment with PHA, a so-called "Hatch Act" pledge, agreeing not to participate in political campaigns (FF 41, 50, 62, 71, App. A38, A39, A40, A41). Each Respondent received the Memorandum and affirmatively refused to sign it (FF 46, 55, 67, 76, App. A39, A40, A41, A42). Each was given an opportunity to explain the reasons for not signing it and to ask

questions (FF 47, 56, 68, 77, App. A39, A40, A41, A42). Each Respondent again affirmatively refused to sign and was dismissed (FF 48, 58, 69, 79, App. A39, A40, A41, A42).

B. The Proceedings Below.

Approximately three months after their discharge, Respondents commenced this action, with original federal jurisdiction based upon 28 U. S. C. § 1343(3) and (4), 28 U. S. C. § 1331, and 42 U. S. C. § 1983. The Complaint contained three Counts and averred in Count I—that Respondents' discharge violated their right to freedom of speech, in Count II—that the Memorandum was unconstitutionally vague and overbroad, and in Count III—that discharge without a pre-termination hearing deprived Respondents of property without procedural due process of law. PHA filed a Motion to dismiss the Complaint or, in the alternative, for summary judgment, and an Answer to the Complaint.

After argument, the District Court granted Petitioners' Motion, in part, and dismissed Counts II and III of the Complaint. The District Court held a full hearing on the remaining issue of whether Respondents' rights of freedom of speech had been violated.

On September 24, 1973, the District Court filed an Opinion and entered Judgment in favor of Petitioners. The Opinion made the following finding of the reasons for the issuance of the Memorandum and the governmental interest served by it:

> The purpose of the memorandum, the reasons for its issuance, and the governmental interests served by it, were as follows:
>
> (a) The memorandum was issued to insure a free and open election without interference, either pro or con, by Philadelphia Housing Authority employees (N. T. pp. 131-137).

(b) The memorandum was issued to prevent violent confrontations of the type which had occurred on two prior occasions during disputes between the Philadelphia Housing Authority and the Residents Advisory Board (N. T. pp. 137, 148, 149).

(c) The memorandum was issued to protect the tenants' rights of freedom of expression and freedom of choice in representation with regard to the election (Affidavit of Gilbert Stein, N. T. pp. 131, 133-137).

(d) The Philadelphia Housing Authority tenants were dependent on social workers and other Philadelphia Housing Authority employees for the necessities of life, and would therefore be subject to intentional or unintentional coercion by the social workers and other Philadelphia Housing Authority employees to vote the way the tenant thought the Philadelphia Housing Authority employee wanted him or her to vote (Affidavit of Gilbert Stein, N. T. pp. 131, 133, and 137).

(e) If the Philadelphia Housing Authority employees were allowed to campaign for or against the Resident Advisory Board, the tenants might erroneously come to believe, or continue to believe, that the Resident Advisory Board and the Philadelphia Housing Authority were secretly acting in concert (N. T. pp. 131-140).

(f) The Philadelphia Housing Authority employees might devote their time and efforts to campaigning for or against the Resident Advisory Board rather than devoting their energies to their regular duties (N. T. p. 137).

(g) The memorandum was necessary to preserve the Philadelphia Housing Authority's public integrity

in that, the Philadelphia Housing Authority should not, through its employees or otherwise, take or appear to take a position, either way, with reference to the Resident Advisory Board election or controversy (N. T. pp. 131-137).

(h) If the Philadelphia Housing Authority employees were allowed to campaign during the election, the results of the election might be set aside. (FF 19, App. A31-A33).

With the facts of the governmental interests necessitating the Memorandum established, the District Court found the decisions of this Court in *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U. S. 548 (1973), and *Broadrick v. Oklahoma,* 413 U. S. 601 (1973) "dispositive" of the case and held that PHA's discharge of Respondents was constitutionally permissible.

Respondents appealed the Judgment and Order of the District Court to the United States Court of Appeals for the Third Circuit. In an opinion filed on April 16, 1974, the Court of Appeals noted that the District Court had dismissed Counts II and III of the Complaint and entered judgment in favor of Petitioners on Count I. The Court of Appeals stated that it reversed "the judgment of the District Court." (App. A7). Except for a descriptive reference, the Opinion of the Court of Appeals did not mention the claim in Count III of the Complaint of deprivation of property without due process of law, and stated, as to the claims of Count II of the Complaint, "our opinion in this case should not be interpreted as resting upon 'overbreadth', 'vagueness' or like doctrines." By Judgment dated April 16, 1974, the Court of Appeals reversed both the Judgment of the District Court of September 26, 1973, and the Order of the District Court of May 15, 1973.

VI. REASONS FOR GRANTING A WRIT OF CERTIORARI.

A. The Decision of the Court of Appeals Is in Conflict With the Applicable Decisions of This Court With Respect to the Extent of the Power of a Public Employer, Under the First and Fourteenth Amendments of the United State: Constitution, to Protect Admitted, Substantial Governmental Interests by Limiting the Political Activity and Campaigning of Its Employees.

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact of a trial court "shall not be set aside unless clearly erroneous." See *Zenith Radio Corp. v. Hazeltine Research,* 395 U. S. 100, 123 (1969). In accordance with this stricture, the Court of Appeals did not in any manner disturb the findings of the fact of the District Court. The fact of the substantial, compelling governmental interests of PHA necessitating the issuance and enforcement of the Memroandum, as found by the District Court (FF 19, App. A31-A33) must therefore be deemed admitted for purposes of the decision of the Court of Appeals and this Petition.

In the context of these admitted facts, the Court of Appeals determined that the question before it was whether the Memorandum's prohibition on discussion of the election "was justified by PHA's interest in preventing political 'interference' in the referendum." (App. A14). In this regard, the Court of Appeals concluded that the decisions of this Court in *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U. S. 548 (1973) and *Broadrick v. Oklahoma,* 413 U. S. 601 (1973), relied on by the District Court, dealt only with a species of political "activity" which did not include "discussion",

and that the Memorandum's proscription against PHA employees discussing RAB politics with tenants was not sufficiently limited to be constitutionally permissible under these decisions.

Petitioners respectfully submit that this conclusion is both contrary to the decisions in the *Letter Carriers* and *Broadrick* cases, and in conflict with other applicable decisions of this Court.

1. This Court Had Held, Three Times in the Past Year, That a Public Employer May Constitutionally Proscribe the Political Discussion, Activities and Campaigning of Its Employees to Protect and Maintain the Integrity, Reputation and Efficiency of, and Confidence in, the Public Service.

In the *Letter Carriers* and *Broadrick* cases, this Court upheld the validity of Section 9(a) of the Hatch Act, 5 U. S. C. § 7324(a)(2), and affirmed the prior decision of *United Public Mine Workers v. Mitchell*, 330 U. S. 75 (1947), that a governmental employer could constitutionally regulate political activity and campaigning by its employees. In reaching this conclusion, this Court affirmed the doctrine that government regulation of the speech of its employees and of the general citizenry differ very significantly. Citing *Pickering v. Board of Education*, 391 U. S. 563, 568 (1968) this Court stated:

> The Government has an interest in regulating the conduct and "the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer,

in promoting the efficiency of the public service performed through its employees." *United States Civil Service Commission v. National Association of Letter Carriers, supra* at 564.

This Court further made clear that the necessary balancing of interests was not to be based upon any absolute dichotomy between "activity" and "discussion", nor any other absolute determinant. *Id.* at 567. See also *Times Films Corporation v. Chicago*, 365 U. S. 43, 47 (1961); *Kingsley Books v. Brown*, 364 U. S. 436, 441 (1958). It must rather consider all aspects of the interests involved, including the substantial public interest that government employees avoid not only the fact, but appearance, of political conflict. As the opinion in *Letter Carriers* stated:

> It is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent. 413 U. S. at 565.

Approximately ten months after the decisions in the *Letter Carriers* and *Broadrick* cases, and on the same day as the decision of the Court of Appeals in the instant case, this Court again affirmed the constitutionality of the discharge of a public employee because of his speech, when a substantial countervailing governmental interest exists. In *Arnett v. Kennedy*, — U. S. —, 40 L. Ed. 2d 15 (1974), this Court upheld the provisions of the Lloyd-LaFollett Act, 5 U. S. C. § 7501, and the dismissal of a non-probationary civil service employee for a public statement made against two other federal employees.

In determining that the discharge of the employee under the Lloyd-LaFollett Act, because of his speech, was constitutionally permissible, the opinion stated:

> The Act proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees then are necessary for the protecting of the Government as an employer. 40 L. Ed. 2d at 38.

In his concurring opinion, Mr. Justice Powell, joined by Mr. Justice Blackmun, reviewed the governmental interest involved in the case, and stated:

> In the present case, the Government's interest, and hence the public's interest is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely effect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency. . . . Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. 40 L. Ed. 2d at 41.

As these decisions make clear, this Court has held several times that a Government, as an employer, has a

substantially different interest in regulating the speech of its employees than the speech of the general citizenry, based, to a great extent, on the public interest of maintaining the integrity, reputation, and efficiency of the public service. When "politics" threatens these interests, the constitutionally permissible action of the public employer in restricting its employees extends not only to limits on "activities", but also to proscriptions of campaigning and political "discussion".

2. The Memorandum Restrained Only That Speech Which Improperly Damaged and Impaired the Integrity, Reputation, and Efficiency of PHA as an Employer, and Respondents' Discharge Was Constitutionally Permissible Under the Applicable Decisions of This Court.

The Opinion of the Court of Appeals concluded that the *Letter Carriers* and *Broadrick* decisions were not applicable to this case because they dealt with a form of political "activity" which did not include the political "discussion" by public employees, such as that prohibited by the Memorandum.

In fact, what this Court held in the *Letter Carriers* case was:

> We agree with the basic holding of *Mitchell* that plainly indentifiable acts of political management and *political campaigning* may constitutionally be prohibited on the part of federal employees. 413 U. S. at 567. (Emphasis added.)

In *Arnett*, this Court held restraints on the speech of a public employee to be constitutionally permissible because they "proscribe[d] only that public speech which *improp-*

erly damages and impairs the reputation and efficiency of the employing agency and thus imposes no greater controls on the behavior of federal employees then are necessary for the protection of the government as an employer." 40 L. Ed. 2d at 38 (emphasis added).

Clearly the applicable decisions of this Court do not hold that the constitutionally permissible power of a public employer to limit, for substantial governmental interests, the political pursuits of its employees stops at "activities". Rather, this Court has specifically decided that such power of a governmental employer extends to the restriction of political campaigning as well as speech which improperly damages and impairs the reputation and efficiency of the public employer.

The opinion of the Court of Appeals also refers to the Memorandum as restraining "all discussion" and appears to find that such a restriction was not sufficiently limited to be acceptable under the *Letter Carriers* and *Broadrick* decisions. In fact, this is not the case. The Memorandum did not limit "all discussions", but only discussion by PHA Employees of RAB politics with PHA tenants. There was no limitation on general public speech concerning the election or on any discussion with anyone other than a tenant. The Memorandum did not prohibit any discussion with tenants concerning any matter, including those relating to RAB, except "RAB politics".

Since the tenants were the only voters in the proposed election, a discussion of politics with such individuals is clearly a limited restriction on "campaigning". It should be noted in this regard that the District Court found, as facts, that each of the Respondents knew, or should have known what the term "RAB politics" meant, and each therefore knew that it was "campaigning" which was prohibited by the Memorandum (FF 40, 44, 53, 65, 74, App.

A38, A39, A41, A42). This, of course, is exactly the same restriction that this Court held constitutionally permissible in *Letter Carriers*.

The Memorandum's restrictions on discussion were further limited only to that speech which would improperly damage the reputation, efficiency, and integrity of PHA. It imposed no greater control than was necessary to protect the important governmental interest admittedly at stake. These included avoiding coercion of tenants by employees, maintaining both the fact and appearance of neutrality by PHA, avoiding the erroneous but extremely damaging belief by tenants that PHA and RAB were conspiring to defraud the tenants, and ensuring that the election both was, and appeared to be, fair and open and free from intervention by PHA or its employees. Clearly, the one possible action by PHA employees which was most likely to have a serious adverse effect on these interests was employee campaigning, or, stated differently, discussion of RAB politics by PHA employees with PHA tenants. It is therefore evident that the only action of PHA which could be reasonably calculated to serve the governmental and public interests which were admittedly at stake would be a proscription of discussion of RAB politics by PHA employees with the tenants. This is precisely the same type of limitation of speech which was upheld by this Court as constitutionally valid in the *Arnett* case.

It is therefore clear that limitations on discussion in the Memorandum, and the discharge of Respondents for failure to agree to comply with the Memorandum, are within the constitutionally permissible scope of activity of a public employer as set forth in the applicable decisions of this Court. The holding of the Court of Appeals that the restrictions of the Memorandum and discharge of Respondents was unconstitutional is in conflict with such decisions.

B. The Decision and Opinion of the Court of Appeals Raises Important Issues Under the First and Fourteenth Amendments of the United States Constitution Which Should Be Reviewed by This Court.

The opinion of the Court of Appeals begins as follows: "This case presents a novel question of first amendment jurisprudence." (App. A2). As discussed herein, Petitioners submit that this is in error and that the Court of Appeals decided the issue of this case contrary to decisions of this Court on the same question. Even assuming, *arguendo,* however, that this case does in fact present a "novel question", Petitioners respectfully submit that this "question" raises extremely important issues arising under the United States Constitution which should be reviewed and decided by this Court.

This case poses the question of the extent of the constitutionally permissible power of a state agency to restrict the speech of its employees, within a limited scope, in order to serve substantial, admitted governmental and public interests. More specifically, this case involves a public agency which had a very significant and compelling interest in preventing "interference" in a highly explosive election. While the right to impose some limits on active interference by employees in the election was apparently conceded, the question was presented as to the constitutional limits on the right to protect the governmental and public interest, within the limited context of the election, by restraints on discussion of politics.

This Court has found the question of a public employer's power to limit, in the interest of maintaining the integrity and efficiency of the public service, the speech of its employees sufficiently important to give it very careful consideration several times in the past decade. See *Cafeteria Workers v. McElroy,* 367 U. S. 886 (1961); *Pickering v.*

Board of Education, 391 U. S. 563 (1968); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U. S. 548 (1973); *Broadrick v. Oklahoma*, 413 U. S. 601 (1973); *Arnett v. Kennedy*, — U. S. —, 40 L. Ed. 2d 15 (1974).

If, as the Court of Appeals stated in the opening of its opinion, this case presents a novel question of first amendment jurisprudence within this context, it is a critically important issue of federal constitutional law. Not only does it raise major questions arising under the first and fourteenth amendments of the Constitution, but it also presents an issue which could have a very broad impact upon the action of public employers. A public employer can often find itself in a position where it is faced with significant threat to substantial governmental and public interests which can be met effectively only by a limited restriction upon the speech and discussion of its employees. This case presents the question of whether and to what extent such interests may be protected by such limited proscriptions of discussion.

Petitioners respectfully submit that such an issue should be reviewed and decided by this Court.

C. The Court of Appeals, Without Opinion, Entered a Judgment Which, by Its Terms, Is in Direct Conflict With the Decisions of This Court and Purports to Decide an Important Issue of Pennsylvania Law Directly Contrary to the Applicable Decisions of the Supreme Court of Pennsylvania.

The Opinion of the Court of Appeals states only that it reverses the "Judgment" of the District Court (App. A7). That Judgment dealt only with Count I of Respondents' Complaint which claimed a violation of their rights of freedom of speech. Counts II and II of the Complaint,

dealing with "vagueness" and "overbreadth" and alleging deprivation of property without procedural due process of law, were dismissed by the Order of the District Court of May 15, 1973. As to these Counts, the Opinion of the Court of Appeals specifically states that it "should not be interpreted as resting upon 'overbreadth', 'vagueness' or like doctrines," (App. A18) and, except for a one sentence descriptive reference, does not even mention the procedural due process claims of Count III of the Complaint.

Notwithstanding the above statements and omissions in its Opinion, the Judgment of the Court of Appeals specifically reverses not only the District Court's Judgment of September 26, 1973, but also its Order of May 15, 1973, which dealt only with the vagueness and overbreadth claim and the procedural due process claim. Since the Court of Appeals specifically stated that its decision did not rest upon vagueness and overbreadth doctrines, it appears that the Judgment could be construed as a reversal of the District Court's decision that Respondents were not deprived of procedural due process of law by virtue of PHA's failure to grant them a pre-termination hearing.

To the extent that this is the case, Petitioners respectfully submit that such a decision is in direct conflict with the decisions of this Court, and that it also decides an important issue of Pennsylvania state law in direct conflict with the applicable decisions of the Supreme Court of Pennsylvania.

1. The Decisions of This Court Require That State Law Control the Determination of Whether the Interest of an Employee of a State Agency in Continued Employment and Job Tenure Is "Property" Under the Fourteenth Amendment.

In *Board of Regents of State Colleges v. Roth,* 408 U. S. 564 (1972) and *Perry v. Sindermann,* 408 U. S. 593

(1972), this Court held that an employee of a state agency might have a property interest in continued employment, sufficient to be protected by the procedural aspects of the due process clause of the fourteenth amendment, only if the employee could establish a "legitimate claim" to entitlement to job tenure. This Court made clear that the legitimacy of such a claim does not arise from the Constitution, but rather from state law. As this Court stated in the *Roth* case:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. 408 U. S. at 577.

This was restated in the *Perry* case, 408 U. S. at 602 n. 7, and, in the same note, this Court made clear that it would be state law which would ultimately control the determination of whether the employee in that case had a protected property interest, by stating:

> If it is the law of Texas that a teacher in a Respondent's position has no contractual or other claim to job tenure, the Respondent's claim would be defeated. 408 U. S. at 602 n. 7.

Mr. Chief Justice Burger, in his concurring opinion in *Perry*, further emphasized this point by stating:

> Thus, whether a particular teacher in a particular context has any right of administrative hearing hinges on a question of state law. *Id.* at 603-604.

2. Under Pennsylvania Law, Respondents Can Have No Legitimate Claim to Job Tenure and Thus No "Property" Interest in Continued Employment Under the Fourteenth Amendment.

Pennsylvania state law makes clear beyond any question that Respondents could not possibly have any legitimate claim to job tenure. In *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166 A. 2d 278 (1960) the Supreme Court of Pennsylvania considered the claim of a public employee who had been dismissed in violation of his employment contract. The Court held that, as a matter of law, a public authority in Pennsylvania, such as PHA, has no power, unless conferred by a comprehensive statutory scheme, to grant its employees tenure, "in the sense of having a claim to employment which precludes dismissal on a summary basis." The Court concluded that the contract of employment with the public employee in the *Scott* case was unauthorized and void as a matter of law and that the employee could not maintain an action for damages. This position has been consistently reaffirmed by the Pennsylvania Courts. See *Naef v. City of Allentown*, 424 Pa. 597, 227 A. 2d 888 (1967); *American Federation of State, County, and Municipal Employees v. Shapp*, 443 Pa. 527, 280 A. 2d 375 (1971); *Mahoney v. Philadelphia Housing Authority*, Pa. Commonwealth Court, 14 T. D. 1973 (June 5, 1974); cf. *Mitchell v. Chester Housing Authority*, 389 Pa. 314, 132 A. 2d 873 (1967); *Commonwealth ex rel. Specter v. Moak*, 452 Pa. 482, 307 A. 2d 884 (1973).

As a result of the *Scott* decision and the above cited cases which followed, it is now established Pennsylvania law that a public employee may have "tenure in public employment, in a sense of having a claim to employment which precludes dismissal on a summary basis" only pursuant to a comprehensive statutory scheme explicitly set

out by the legislature. *Scott v. Philadelphia Parking Authority, supra* at 154-155, 166 A. 2d at 280-281. There is no such statutory scheme which is even arguably applicable to Respondents in this case. In the words of the Supreme Court of Pennsylvania in the *Scott* case, Respondents were, under Pennsylvania law, "employees-at-will". *Id.* at 154, 166 A. 2d at 280.

It is therefore clear that, under the law of Pennsylvania, Respondents could not possibly have had a legitimate claim to job tenure or any other form of job continuation in their employment with PHA. In accordance with the clear dictates of the decisions of this Court in *Board of Regents v. Roth, supra,* and *Perry v. Sindermann, supra,* Respondents had no property interest in continued employment and were not deprived of property without due process of law by their dismissal without a pre-termination hearing. To paraphrase this Court's opinion in *Perry,* it is the law of Pennsylvania that employees in Respondent's position have no contractural or other claim to job tenure. Respondents' claim must, therefore, be defeated.

To the extent that the Judgment of the Court of Appeals purports to reverse the decision of the District Court, as expressed in its Order of May 15, 1973, that Respondents' dismissal without a pre-termination hearing did not constitute a deprivation of property without due process of law, that decision and judgment is in direct conflict with the applicable decisions of this Court and decides an important issue of Pennsylvania state law directly contrary to the applicable decisions of the Supreme Court of Pennsylvania.

VII. CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant this Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit.

Respectively suumitted,

HAROLD CRAMER,
1510 The Fidelity Building,
Philadelphia, Pa. 19109
Attorney for Petitioners.

CERTIFICATE OF SERVICE.

I hereby certify that on this 9th day of July, 1974, three copies of this Petition for a Writ of Certiorari were hand delivered to the office of Harold I. Goodman, Esquire, and Bruce E. Endy, Esquire, Community Legal Services, 313 South Juniper Street, Philadelphia, Pennsylvania 19107, attorneys for Respondents Alderman, Smith, and Williams and that three copies of this Petition for a Writ of Certiorari were hand delivered to the offices of Robert J. Reinstein, Esquire, 1715 North Broad Street, Philadelphia, Pennsylvania 19122, attorney for Respondent Deming.

I further certify that all parties required to be served have been served.

HAROLD CRAMER,
1510 The Fidelity Building,
Philadelphia, Pa. 19109
Attorney for Petitioners.

Appendix.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1924

BRENDA ALDERMAN, FLOYD SMITH, JERRI WILLIAMS, and KAY DEMING,
Appellants

v.

THE PHILADELPHIA HOUSING AUTHORITY, GILBERT STEIN and THOMAS J. KELLY, individually and in their capacity as past and present Executive Directors of the Philadelphia Housing Authority; THOMAS McINTOSH, JAMES KNOWLAND, CARMELITA LERNER, FROSTEENA KEE, and WILLIAM RAFSKY, individually, and in their capacity as trustees of the Philadelphia Housing Authority,
Appellees

ON APPEAL FROM THE JUDGMENT AND ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. C. Civil No. 73-766

Argued February 14, 1974

Before: VAN DUSEN, ADAMS, *Circuit Judges*, and NEALON, *District Judge*.

HAROLD I. GOODMAN
BRUCE E. ENDY
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Philadelphia, Pa. 19107
Attorneys for Appellants
Alderman, Smith and Williams

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Attorney for Appellees

OPINION OF THE COURT

(Filed April 16, 1974)

ADAMS, *Circuit Judge*.

This case presents a novel question of First Amendment jurisprudence; namely, whether the imposition of a "prior restraint" by a public agency upon the speech of its employees was justified by the agency's interest in curtailing certain political activity by such employees. We hold that, in the circumstances presented here, the restraint constituted an impermissible infringement of the employees' rights of free expression.

I.

An understanding of the case requires a rather extensive exposition of the factual backdrop.

The appellants, plaintiffs in the district court, are four former employees of the Philadelphia Housing Authority

("PHA"). They were summarily discharged from their jobs for refusing to sign a "Memorandum" directing that they refrain from making *any* statements regarding an election among PHA tenants. The PHA is a public agency created by state statute [1] for the purpose, *inter alia*, of providing "low-income" housing. It administers and maintains upwards of 20,000 housing units, where more than 100,000 persons reside.[2] Appellee Gilbert Stein was the Executive Director of the PHA, serving in that capacity from August of 1972, until February of 1973.

The Resident Advisory Board, Inc. ("RAB") purports to be the formal representative of public housing tenants in Philadelphia. At the time Mr. Stein became Director of PHA, there existed a controversy between PHA and RAB over whether RAB's representation of tenants should continue and, indeed, whether RAB was in fact representative of the interests of Philadelphia public housing residents.

In October, 1972, PHA decided to hold a "plebiscite" or referendum to determine whether public housing tenants, in their dealings with the PHA, desired representation by RAB. The vote was initially scheduled for December, 1972. In November, 1972, prior to the date set for the election, Mr. Stein caused to be issued to all PHA employees the following "Memorandum:"

> "No PHA employee shall engage in any form of interference during the upcoming tenant plebiscite to determine whether residents of the PHA-managed properties want to be represented by the RAB Corporation
>
> . . . .

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1. Housing Authorities Law Act of May 28, 1937, 35 P. S. § 1541 *et seq.*

2. *See* Brief of Appellees, at 2.

> It is the policy of this authority to encourage all tenants to exercise their right of choice . . . but there should be no attempt by PHA employees to discuss RAB politics with tenants, either pro or con.
>
> Any employee who engages in such activity will be subject to immediate dismissal (emphasis added)
>
> /s/ Gilbert Stein
>
> . . . . . .
>
> I have read the above and understand that as an employee of the Philadelphia Housing Authority, I must abide by this restriction.
>
> _____ [3]
>
> Employee's Signature

Mr. Stein was apparently of the opinion that, if permitted to do so, many PHA employees would campaign actively against the RAB, that violent confrontations might result, and that PHA tenants might be influenced by PHA employees to vote against the RAB.[4] His reaction was to issue the memorandum set forth above.

Subsequent to the issuance of the Stein memorandum, but before the plebiscite scheduled for December of 1972 could be held, RAB brought a suit in the district court to enjoin the election.[5] As a result, the vote was postponed until May of 1973. On December 11, 1972, PHA and RAB entered into a stipulation in that lawsuit, approved by the district court, which provided in part that:

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3. Finding of Fact No. 18, district court opinion of September 24, 1973.

4. *See* Brief of Appellees, at 5.

5. Resident Advisory Bd. v. Philadelphia Housing Authority, C. A. No 72-2399 (E. D. Pa.). No aspect of the PHA-RAB lawsuit is before us in this appeal, nor are any of the appellants here involved in that suit.

"The Philadelphia Housing Authority agrees that it will not take a position on the election provided for above. This shall not prevent PHA from answering any criticisms of its personnel or policy."[6]

All but 65 of the PHA's employees agreed to, and did, sign the Stein memorandum.[7] Four of the non-signers, the appellants in this case, were discharged for their failure to sign. Some explanation of the circumstances surrounding the refusal to sign by each of the four appellants may be helpful here.

Appellant Deming, a social worker, stated in a letter to the PHA that "I find it impossible to sign the attached memo because I view it to be a waiver of my First Amendment rights of free speech . . . ."[8] She also indicated that some discussion of the upcoming PHA-RAB election with her clients might prove to be a necessary aspect of her professional duties, and that, in any event, she wished to retain the right to express her views during off-duty hours. At least by her own understanding, she did have some "responsibility of not expressing my ideas while at the same time representing myself as an employee of PHA." Deming was dismissed from PHA employment on December 19, 1972, for the express reason that she had refused to sign the Stein memorandum.[9]

Appellant Smith, in a letter to PHA dated December 29, 1972, indicated an initial willingness to sign the Stein

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6. Finding of Fact No. 21, district court opinion of September 24, 1973.

7. PHA claims that its records do not show affirmatively that the other 61 employees actually failed to sign, but that there is no indication that they did sign. This is ascribed, to some extent, to their absence from work at the time the memorandum was circulated. *See* Brief of Appellees, at 7.

8. Brief of Appellants, at 9; App. 11.

9. Direct testimony of Gilbert Stein, App. 282; Finding of Fact No. 28, district court opinion of September 24, 1973.

memorandum, provided Smith received assurance that the memorandum reflected only an attempt by PHA to comply with the Stipulation that had been entered on December 11, 1972 in the RAB-PHA lawsuit.[10] Smith never received a response to his letter. For his failure to sign, he was dismissed by PHA on December 29.

Appellant Alderman attempted, unsuccessfully, to discuss the memorandum with Mr. Stein. On January 5, 1973, she was dismissed by PHA for her failure to sign. Appellant Williams was likewise dismissed, on December 29, for failure to sign the memorandum. Both Ms. Alderman and Ms. Williams were public housing tenants while they were employed by PHA. All four appellants, upon beginning to work for PHA, *had* signed a Hatch Act pledge, prohibiting them from active partisan participation in political campaigns.

Although they refused to sign the memorandum, it is uncontested that none of the appellants ever interfered in the RAB election, and that none of them ever discussed RAB politics with public housing tenants prior to their dismissal.[11]

As previously noted, Mr. Stein ceased serving as Executive Director of PHA on February 20, 1973. However, on March 2, 1973, the PHA house organ "The Good Neighbor" published a "report" by Mr. Stein that commented extensively on PHA-RAB relations and on the upcoming plebiscite.[12] On May 9, 1973, the district court in the PHA-RAB litigation, issued an order enjoining PHA from, inter alia, "making known" its position on the upcoming plebiscite.

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10. See Note 6, *supra*, and accompanying text.

11. Finding of Fact No. 26, District Court Opinion of September 24, 1973.

12. The appellants contend that Mr. Stein's report shows, inter alia, that there was not a compelling interest in silencing *all* discussion regarding the election.

In April of 1973, Alderman, Williams, Smith and Deming brought suit in the district court, under 42 U. S. C. § 1983, against Mr. Stein and PHA, contending that the appellants' discharges from employment trenched on certain of their civil rights.[13] The complaint was framed in three counts: Count I alleged that the memorandum as implemented by the discharges amounted to an unconstitutional prior restraint on speech, Count II sought to have the Stein memorandum declared unconstitutionally "vague" or "overbroad," and Count III challenged the dismissals on grounds of procedural due process. The appellants sought declaratory and mandatory injunctive relief—that is to say, reinstatement with back pay, interest, and accrued seniority.[14]

The district court, by two separate orders, ruled against the discharged employees on all three counts of the complaint. On May 15, 1973, the district court granted appellees' motion to dismiss Counts II and III of the complaint. On September 24, 1973, that court, after a hearing, entered an order granting judgment to appellees on Count I. Both are contested on this appeal.

We reverse the judgment of the district court, and adjudge the appellants entitled to relief based on their prior restraint argument. The justification proffered by PHA and Mr. Stein for the attempt, by way of their memorandum and the appellants' discharges, to throttle *all* discussion by PHA employees of the RAB referendum, is, stated broadly, that the PHA had a legitimate and compelling interest in preserving intact the image of PHA's impartiality. Important as this interest may have been, we conclude that it

13. Jurisdiction was based upon 28 U. S. C. §§ 1343, 2201, and 2202.

14. The complaint also sought a declaration and injunction to protect appellants' procedural rights in any disciplinary hearing after their reinstatement.

did not outbalance the weighty values sheltered by the First Amendment.

II

Freedom of speech and expression occupies an exalted niche in the empyrean of personal liberties guaranteed by the Constitution.[15] This special position may be a function of democratic theory. The right is viewed as one of "those liberties of the individual which history has attested as the indispensible conditions of an open as against a closed society. . . ."[16] To an extent, the favored status proceeds from the dynamics of free speech itself, inasmuch as it benefits and protects not only the speaker but, *mutatis mutandis,* the receptor of the speech as well.[17] Whatever the explanation for the ascendancy of the First Amendment

15. Without taking sides in the "preferred position" debate, *see* Kovacs v. Cooper, 336 U. S. 77, 88 (majority opinion of Reed, J.) 90-97 (concurring opinion of Frankfurter, J.) (1949), there can be little doubt that the Supreme Court has shown a special solicitude for the right to freedom of expression. Even Justice Frankfurter's objection to the phrase, "the preferred position of freedom of speech," was apparently not grounded in any belief that such freedom is in all respects coequal with other rights, but rather in the feeling that "preferred position" is only a "formula" that "makes for mechanical jurisprudence." *Id.* at 96. The Supreme Court's special concern for the First Amendment right is manifest in such decisions as Thomas v. Collins, 323 U. S. 516, 527 n.12 (1945), and Schneider v. State, 308 U. S. 147, 161 (1939). Professor Wechsler has suggested that the "preferred position" argument is "pernicious" insofar as it injects a mechanistic note into First Amendment decision-making. He states, however, that "[i]t has a virtue . . . insofar as it recognizes that some ordering of social values is essential; that all cannot be given equal weight if the Bill of Rights is to be maintained." Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 25 (1959). *See also* Berns, Freedom, Virtue and the First Amendment 73-128 (1957).

16. Kovacs v. Cooper, *supra,* at 95 (concurring opinion of Frankfurter, J.).

17. "From the obverse side [the system of freedom of expression] includes the right to hear the views of others and to listen

protection, courts have remained particularly sensitive to governmental regulation that tends to impinge on expressive freedom.

This heightened sensitivity is manifest in, among other things, judicial distaste for the "prior restraint." Simply put, a prior restraint is an official restriction imposed upon speech or other forms of expression in advance of actual publication.[18] The concept does not treat the question of what subsequent punitive sanctions, if any, may properly be imposed for engaging in speech.[19]

It is by now axiomatic that "[a]ny system or prior restraints comes to [a court] bearing a heavy presumption against its constitutional validity."[20] A fuller understanding of the historical and theoretical underpinnings of this judicial attitude should help to clarify our decision in this case.

The use of a prior restraint as an implement of official control of expression can be traced back at least as far as a

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17. (Cont'd.)
to their version of the facts. It encompasses the right to inquire and, to a degree, the right of access to information." Emerson, The System of Freedom of Expression 3 (Vintage ed. 1971). The traditional sanctity of freedom of expression probably owes something, also, to a recognition of the central role played by literature in man's ascent from barbarism. Milton, in his *Areopagitica*, expressed it thusly: "Who kills a man kills a reasonable creature, God's image; but he who destroys a good book kills reason itself. . . ."

18. Emerson, *The Doctrine of Prior Restraint*, 20 Law and Contemp. Problems, 648 (1955) (hereinafter "Emerson, Prior Restraint"); Emerson, The System of Freedom of Expression 504 (Vintage ed. 1971) (hereinafter "Emerson, Freedom of Expression"). *See also Near v. Minnesota*, 283 U. S. 697, 713-14 (1931); 4 Blackstone, Commentaries on the Laws of England 151-52.

19. Emerson, Freedom of Expression, at 504.

20. New York Times v. United States, 403 U. S. 713, 714 (1971) (per curiam); Organization for a Better Austin v. Keefe, 402 U. S. 415, 419 (1971); Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 70 (1963); Near v. Minnesota, 283 U. S. 697, 719-20 (1931); Patterson v. Colorado, 205 U. S. 454, 462 (1907).

papal decree of 1501.[21] In England, where printing franchises were controlled by the Crown, there developed a complex system of governmental restraints on publication, typified by the Licensing Acts.[22] The Licensing Act of 1662 was enacted with the clear intention of imposing a prior restraint on, and not merely a *post facto* punishment for, "seditious, treasonable and unlicensed books and pamphlets [sic] . . . ."[23] No person was permitted to print any material without prior approval by the appropriate state functionary. The Act, as administered by the zealot licensor L'Estrange, "gagged the London Press then, as it has never been gagged before or since."[24]

In the latter part of the Seventeenth Century public sentiment mounted against the Act and it lapsed, never to be revived.[25] When the First Amendment was drafted and adopted in 1791, the repugnance felt toward the old English system of censorship remained undimmed. Indeed, some have maintained that the Amendment was aimed primarily at prior restraints, and was not intended to proscribe subsequent punishments for various sorts of expression.[26] In any event, public antipathy toward prior restraints was transmitted to our law through the First Amendment. Judicial

21. Pope Alexander VI in that year issued a bull prohibiting unlicensed printing. *See* Emerson, Prior Restraint at 650.

22. *See generally* Holdsworth, History of English Law, Vol. 6, pp. 360-78.

23. *Id.* at 372.

24. *Id.* at 372-73. L'Estrange's zeal as a censor led him beyond a concern for the imposition of "gags" on the press, to a desire to "make sure of destroying offenders utterly." *Id.* at 373 n.1.

25. Emerson, *Prior Restraint* at 651. Emerson notes that, though the English system of statutory prior restraint was allowed to die, subsequent punishments for seditious libel and blasphemy were applied with increasing frequency and severity. *Id.*

26. *Id.* at 652. *Cf.* Justice Holmes' remark for the Court in Patterson v. Colorado, *supra*, 205 U. S. at 462: "the main purpose of such constitutional provisions is to prevent all such *previous restraints* upon publications. . . ."

treatment of prior restraints has, at least in this century, reflected these historical developments.

The landmark decision of Near v. Minnesota[27] signals the Supreme Court's first extended disquisition on the doctrine of prior restraint. There the so-called Minnesota Gag Law was challenged on First Amendment grounds. The law provided for suits by the state to enjoin publication or circulation of any periodical found to be "obscene, lewd and lascivious" or "malicious, scandalous and defamatory." Chief Justice Hughes first discussed the doctrine's genealogy. Then, after adding the *caveat* that "the protection even as to previous restraint is not absolutely unlimited,"[28] the Chief Justice left little doubt that the First Amendment tolerates few, if any, prior restraints on speech and press:

> "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.
>
> • • •
>
> "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint. . . ."[29]

There thus was embedded in modern constitutional jurisprudence the concept that any system of prior restraints comes to a court bearing a heavy presumption

27. 383 U. S. 697 (1931).

28. *Id.* at 716. *See* Note 57, *infra.*

29. *Id.* at 716, 720. In our judgment, there is no significant distinction, for First Amendment purposes, between liberty of "speech" and of "the press."

against its validity.[30] The viability of this proposition remains unabated today.[31] Professor Emerson has cataloged the functional justifications for the disfavor in which prior restraints are held.[32] Particularly noteworthy is his observation that a system of prior restraint "subjects to government scrutiny and approval *all* expression in the area controlled—the innocent and borderline as well as the offensive. . . ."[33] In addition, whereas subsequent punishment does not prevent the dissemination of the words in question, a prior restraint, by its very nature, seeks absolutely to exclude the speech from the "market place of ideas."[34] These considerations, together with others, provide firm ground for judicial insistence that, before it may be deemed justified, the government must offer compelling proof that a prior restraint is essential to a vital government interest. In light of this standard, we shall proceed to analyze the justification offered by the appellees, and the district court's evaluation of it.

III

The Stein memorandum was construed by the district court as prohibiting "all Philadelphia Housing Authority Employees from discussing Resident Advisory Board politics with tenants, either pro or con." Neither the PHA nor Mr. Stein dispute that, as so construed—and in light of the discharge of the appellants for their refusal to sign—the memorandum operated as an effective prior restraint, imposed by a governmental body, on the speech of the PHA

30. *See* text accompanying Note 18, *supra,* and cases cited therein.

31. *See, e.g.,* Doe v. McMillan, 412 U. S. 306, 344 (Opinion of Rehnquist, J.) (1973); Albany Welfare Rights Org. v. Wyman, No. 73-1580 (2d Cir., March 14, 1974).

32. Emerson, *Prior Restraint,* at 656-60.

33. *Id.* at 656.

34. *Id.* at 657.

employees.[35] Rather, Mr. Stein and PHA seek to justify the restraint by invocation of the "significant and vital interest" of the PHA in preserving the plebiscite free of "interference" by PHA employees, in "prevent[ing] violent confrontations," and in "protect[ing] the tenants' rights of . . . freedom of choice in representation with regard to the election."[36]

The district court concluded that the Stein memorandum, and the mechanism for its implementation, was necessary to accomplish the PHA's stated goals, and that the resulting prior restraint was justifiable under the Supreme Court's recent "Hatch Act" decisions.[37] It stated:

> "The Philadelphia Housing Authority, like all governmental agencies, has a continuing interest in maintaining the appearance, as well as the fact, of impartiality, and in preventing its employees from engaging in politicking rather than doing their jobs. In view of the Supreme Court's recent decisions in Broadrick . . . and Letter Carriers . . . this interest alone is sufficient to justify substantial restrictions on the employees' freedom of expression."[38]

In our judgment, neither *Broadrick* nor *Letter Carriers*, the "Hatch Act" cases, nor any other case, warrants the interdiction, embodied in the terms and enforcement mechanism of the Stein memorandum, against any and *all*

35. Nor can we fail to note that, inasmuch as the appellants *had* signed a Hatch Act pledge not to engage in "partisan political activity," a fact of which Mr. Stein was aware (app. 255, 357-8), his memorandum was apparently aimed at prohibiting something more than such activity.

36. Brief of Appellees at 10. *See also* Finding of Fact No. 19, district court opinion of September 24, 1973.

37. United States Civil Service Commission v. National Association of Letter Carriers, 413 U. S. 548 (1973); Broadrick v. Oklahoma, 413 U. S. 601 (1973).

38. Opinion of District Court of September 24, 1973.

discussion by PHA employees of the RAB plebiscite. Accordingly, we think that the "heavy burden" cast by the prior restraint cases upon PHA and Stein has not been met, and that the appellants' discharges violated their First Amendment and Fourteenth Amendment rights. Close analysis of the "Hatch Act" cases should serve to explain and illuminate this conclusion.

IV

It is important to make clear at this juncture what we are *not* deciding. We are not deciding whether, under any set of circumstances, some sort of prior restraint on political activity by PHA employees might be justified, nor whether the "Hatch Act" cases can have any application in the context of a more-or-less *ad hoc* administrative measure, such as the Stein memorandum. Rather, the question before us is a less heroic one, namely, whether the prior restraint that absolutely forbade all "discussion" of the RAB plebiscite was justified by the PHA's interest in preventing political "interference" in the referendum. *Letter Carriers* and *Broadrick,* while less than pellucid in all of their implications,[39] make it clear that a restraint such as that in this case may not be countenanced by an analogy to the Hatch Act or to its state counterparts.

The Hatch Act prohibits federal employees from taking "an active part in political management or in political campaigns." In 1947, in United Public Workers v. Mitchell,[40] this provision was first upheld against First Amendment attack. The Supreme Court reasoned that

39. The Supreme Court's promulgation of a "substantial overbreadth" standard has generated considerable controversy. *See* Broadrick v. Oklahoma, 413 U. S. at 621-33 (dissenting opinion of Brennan, J.); *The Supreme Court, 1972 Term,* 87 Harv. L. Rev. 1, 141-53 (1973).

40. 330 U. S. 75 (1947).

Congress' conclusion "that an actively partisan governmental personnel threatens good administration"[41] justified the Act's restriction on political activity. The Court took care to note, however, that it was "only partisan political activity that it interdicted. . . . [Only] active participation in political management and political campaigns [is proscribed]. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted. . . ."[42]

In *Letter Carriers* the validity of the "active part" provision was reaffirmed, and upheld in the face of "vagueness" and "overbreadth" challenges.[43] The Court stated as a foundation for its holding, based on extensive legislative findings, that "the judgment of history" was that "federal service should depend upon meritorious service, and that the political influence of federal employees on others and on the electoral process should be limited."[44] The interest of the government in protecting the civil service from undue political influence, manifested by a series of Congressional debates, was deemed to outweigh the employee's interest in the freedom to engage, unfettered, in partisan political activity.[45]

In *Broadrick*, the Supreme Court sustained state legislation that, in its basic aim and method of implementation, mirrored the Hatch Act.[46] Though the challenged state act

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41. *Id.* at 97-98.

42. *Id.* at 100.

43. *See Letter Carriers, supra,* 413 U. S. at 568. *See also* Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970); Note, *The Void-For-Vagueness Doctrine in The Supreme Court,* 109 U. Pa. L. Rev. 67 (1960).

44. 413 U. S. at 557.

45. That the Court utilized some sort of "balancing" process was made quite explicit. *See* 413 U. S. at 564. *Cf.* Pickering v. Board of Education, 391 U. S. 563, 568 (1968).

46. *See* 413 U. S. at 602.

left state employees with some uncertainty concerning the sort of activities they might permissibly engage in,[47] the Court again rejected a First Amendment vagueness and overbreadth assault on the state statute. And once again, the Court was at pains to note emphatically that the proscription of the Act ran only to "partisan political activity."[48]

The district court in this case perceived firm support in *Broadrick* and *Letter Carriers* for the constitutionality of the appellants' discharges. It stated, "just as the Hatch Act has been held to be constitutional, i.e., not violative of the First Amendment, so must this memorandum be held to be constitutional and non-violative of the First Amendment." We think, however, that *Broadrick* and *Letter Carriers,* properly viewed, carved out carefully circumscribed exceptions to the sweeping injunction of the First Amendment, exceptions allowing a legislature—Congress or state lawmakers—to inhibit *only* "partisan political activity" and not all political "discussion."

The vagueness attack mounted in *Letter Carriers* was predicated upon the assertion by the appellants there that, even were the basic goal of the Hatch Act to be deemed valid, the Act was "incapable of yielding any meaningful rules to govern present or future conduct."[49] The Supreme Court demurred to this contention, ruling that the Civil Service Commission Rules sufficiently "fleshed out" the statute.[50] Reference to those rules indicates that the Hatch Act is in no sense directed at the mere expression of political opinions, or at political discussion *simpliciter.* In-

47. *See Broadrick, supra,* 413 U. S. at 622 (dissenting opinion of Justice Brennan). *See* also Note 38 *supra,* and accompanying text.

48. 413 U. S. at 602.

49. 413 U. S. at 571.

50. *Id.* at 572.

deed, Senator Hatch's explication of the rules makes clear that, under the Act, "[e]mployees may express their opinions on all subjects, but they may not make political speeches."[51] Moreover, as the Supreme Court emphasized, section 7324(b) of the Act "privileges an employee to . . . express his opinion on political subjects and candidates . . ."[52] Thus, in upholding the Act's constitutionality, the Supreme Court did no more than sustain a curb upon political *activity* by governmental employees. To read *Letter Carriers*, as the district court apparently did, to authorize governmental restriction upon *all* forms of political *discussion* or *expression* would be to inflate the Supreme Court's edict far beyond its actual scope.

This conclusion—that neither *Letter Carriers* nor *Broadrick* signals approbation of the sort of blanket prohibition on employee speech embodied in the Stein memorandum—is buttressed by the repeated mention, in those cases, of the sort of employee activity that might legitimately be curtailed. The Hatch Act, the Supreme Court noted, prohibits "active participation in political management of political campaigns;"[53] Congress felt it "essential that federal employees not . . . take formal positions in political parties, nor undertake to play substantial roles in partisan political campaigns;"[54] so, too, may a state forbid any employee to "solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization. . . ."[55]

The excerpted instances set forth above make manifest that *Letter Carriers* and *Broadrick* herald only narrow, carefully drawn exceptions to the First Amendment's pro-

51. *Id.* at 572 n. 18; *see also Id.* at 561.
52. *Id.* at 568.
53. *Id.* at 551.
54. *Id.* at 565.
55. *Broadrick, supra,* 413 U. S. at 606.

tections, not an authorization to restrain politically oriented speech and expression by governmental employees. In addition, the statutes challenged in *Letter Carriers* and *Broadrick* represent a "considered legislative judgment," not the relatively spontaneous decision of a local government administrator.[56]

Thus, we think there is scant support in *Letter Carriers* or *Broadrick* for the district court's conclusion that the appellants' discharges were constitutionally valid. There being little warrant in those cases for *any* sort of inhibition of, or punishment for, politically oriented speech, it can hardly be said that the "heavy burden" imposed on the appellees in their attempt to justify a prior restraint has been adequately shouldered.

We need not decide, of course, whether a more narrowly drawn memorandum might have passed First Amendment muster—for example, a provision carefully limited so as to proscribe "partisan political activity" by PHA employees. Accordingly, our opinion in this case should not be interpreted as resting upon "overbreadth," "vagueness," or like doctrines.[57] Rather, our decision has

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56. We have found nothing in the record to show that there were any deliberations (extended or otherwise) before the issuance of the memorandum, or that the Administrator (here Mr. Stein) was empowered to issue such statements. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 858 (1970).

57. An "overbreadth" analysis "involves scrutiny to determine whether a statute is too sweeping in its coverage." Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 845 (1970). There clearly may be an area of overlap between overbreadth analysis and prior restraint analysis. For example, the "overbroad" aspects of a statute imposing a prior restraint might also be those aspects for which there was no "compelling" justification. The statute would thus be invalid *both* as being overbroad and as an unjustified prior restraint. While this mode of analysis might be useful, particularly in the case of statutes impinging First Amendment interests, we decline to pursue it here. Rather, we concentrate solely on the prior restraint aspects of this case. One purpose served

been limited to the precise facts in question. An absolute prohibition on "discussion" of PHA-RAB politics has not, to us, seemed justified by the governmental interest asserted.[58]

This is not to suggest that a prior restraint on the speech of governmental employees may never be justified by any considerations.[59] It may well be too, that had the appellants been discharged by PHA subsequent to having uttered words that "interfered" with the PHA-RAB plebiscite, or cast doubt on PHA's impartiality,[60] resolution of the ensuing controversy might have been somewhat different. But, on the record here, there was no permissible basis for restraining the appellants in advance from any and all "discussion" of PHA or RAB politics.[61]

The "balancing" task imposed upon us in this case by the prior restraint doctrine is a somewhat sensitive one.

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57. (Cont'd.)
by the overbreadth technique is to allow legislatures to redraft statutes. This purpose would not, obviously, be served in this case. *Id.* Also, the "dynamo of the overbreadth doctrine" is the concern for the "chilling effect" of subsequent punitive measures, a factor of only ancillary concern, if any, in a prior restraint case. *Id.* at 846. Finally, inasmuch as an overbreadth attack allows plaintiffs to assert *jus tertii*, it is of little utility here, since there are no other persons but these appellants who can claim harm from a failure to sign the Stein memorandum. *Id.* at 847.

58. Professor Emerson, writing before the decisions in *Letter Carriers and Broadrick*, expressed the view that the Hatch Act is "incompatible with First Amendment doctrine." Freedom of Expression 592.

59. Prior restraints, for example, may be justified when the nation "is at war." *See* Schenk v. United States, 249 U. S. 47, 52 (1919).

60. *See* text accompanying Note 10a, *infra*.

61. We reject the "right-privilege" argument that, though PHA employees may have a "right" to speak, their employment by PHA is a "privilege," for the enjoyment of which they can be made to abandon the right. *See* McAuliffe v. Mayor of New Bedford, 29 N. E. 517 (Mass. 1892); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

We recognize, and sympathize with, the PHA's desire to preserve intact a public image of political impartiality. We acknowledge, too, that a governmental agency may have a significantly more weighty interest in regulating the speech of its employees than in regulating that of the populace at large.[62] There are, however, two factors in particular which have led us to hold in favor of the appellants. First, precious little in the case law supports the imposition of a restraint on *all* the speech of public employees, even concerning a particularized topic.[63] Second, we think that when a prior restraint is sought to be imposed, it should be as narrowly drawn as possible, consonant with the purpose in question. Thus, assuming *arguendo* the validity of PHA's desire to prevent only partisan political activity in connection with the RAB plebiscite, the failure of the Stein memorandum to reflect such specificity tends, in our judgment, to detract significantly from any attempt to shoulder the "heavy burden" imposed by First Amendment doctrine.

V.

First Amendment theory has appeared, to some, to be in a "chaotic state."[64] Perhaps that is the fate of any constitutional guarantee that stands as a keystone of our political, social and economic freedom. Nonetheless, two aspects of the First Amendment stand out in fairly sharp relief. One, the distaste for prior restraint, is firmly rooted

62. *See* Pickering v. Board of Education, *supra*, 391 U. S. at 568.

63. *See Pickering, supra*, 391 U. S. at 574 ("This Court has also indicated . . . that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. *Garrison v. Louisiana*, 379 U. S. 64 (1964); *Wood v. Georgia*, 370 U. S. 375 (1962).") *Cf.* NLRB v. Gissel Packing Co., Inc., 395 U. S. 575, 616-620 (1969).

64. Emerson, Freedom of Expression 16.

in Anglo-American history, public sentiment, and legality. The other, a straitened channel of permissible restriction on the political activities of government employees, works a delicate balance between personal freedom of expression and governmental necessity. Nothing in this case has persuaded us that the sweeping prohibition embodied in the Stein memorandum fell within the narrow compass of the "Hatch Act" cases. Still less are we convinced that the prior restraining effects of the discharges for failure to sign the memorandum were justified.

Accordingly, the judgment of the district court will be reversed and the case remanded for treatment consistent with this opinion. The district court should be accorded the primary opportunity, as well as responsibility, for framing an appropriate decree of relief.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1924.

BRENDA ALDERMAN, FLOYD SMITH, JERRI WILLIAMS, AND KAY DEMING,
Appellants

v.

THE PHILADELPHIA HOUSING AUTHORITY, GILBERT STEIN AND THOMAS J. KELLY, INDIVIDUALLY AND IN THEIR CAPACITY AS PAST AND PRESENT EXECUTIVE DIRECTORS OF THE PHILADELPHIA HOUSING AUTHORITY, THOMAS McINTOSH, JAMES KNOWLAND, CARMELITA LERNER, FROSTEENA KEE, AND WILLIAM RAFSKY, INDIVIDUALLY, AND IN THEIR CAPACITY AS TRUSTEES OF THE PHILADELPHIA HOUSING AUTHORITY

(D. C. Civil Action No. 73-766)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN and ADAMS, *Circuit Judges* and NEALON, *District Judge.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed May 16, 1973 and September 26, 1973, be, and the same are hereby reversed and the cause remanded for treatment consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

/s/ THOMAS F. QUINN,

Clerk.

April 16, 1974

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN THE.
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-766.

BRENDA ALDERMAN, FLOYD SMITH, JERRI WILLIAMS, AND KAY DEMING,
Plaintiffs

v.

THE PHILADELPHIA HOUSING AUTHORITY, GILBERT STEIN AND THOMAS J. KELLY, INDIVIDUALLY AND IN THEIR CAPACITY AS PAST AND PRESENT EXECUTIVE DIRECTORS OF THE PHILADELPHIA HOUSING AUTHORITY; THOMAS McINTOSH, JAMES KNOWLAND, CARMELITA LARNER, FROSTEENA KEE, AND WILLIAM RAFSKY, INDIVIDUALLY, AND IN THEIR CAPACITY AS TRUSTEES OF THE PHILADELPHIA HOUSING AUTHORITY,
Defendants.

OPINION AND ORDER.

NEWCOMER, *J.* September 24, 1973

Presently before the Court is the above captioned plaintiffs' motion for a declaratory judgment requesting that their terminations of employment by the defendants be

adjudged a violation of their right to freedom of speech as guaranteed and protected by the First Amendment of the United States Constitution and the Civil Rights Act of 1871, Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13, 42 U. S. C. A. § 1983. Also before the Court is the above captioned plaintiffs' motion for a permanent injunction requesting the defendants be compelled to rescind the plaintiffs' terminations, and to restore them to their former employment with back pay at six per cent interest, and seniority retroactive to the dates of their terminations.

On April 2, 1973, the plaintiffs, four former non-tenured employees of the defendant, Philadelphia Housing Authority, filed a Complaint and Motion for a Preliminary Injunction averring that their discharge from the Philadelphia Housing Authority for failure to agree not to interfere with an upcoming Philadelphia Housing Authority tenants' election, regarding the Resident Advisory Board of Philadelphia, Inc., violated their right to freedom of speech. The Plaintiffs also averred that a memorandum circulated by the Philadelphia Housing Authority was vague and overbroad, and for that reason, unconstitutional. Furthermore, the plaintiffs averred that their discharge was unlawful because the Philadelphia Housing Authority failed to give them a prior evidentiary hearing.

On April 13, 1973, the plaintiffs withdrew their motion for a preliminary injunction. Thereafter, the Philadelphia Housing Authority filed an answer to the complaint and a motion to dismiss. The bases of the defendants' motion were as follows:

A. The Philadelphia Housing Authority's discharge of the plaintiffs for failure to sign the above mentioned memorandum and to agree not to interfere with the upcoming Resident Advisory Board election was a reasonable exercise of proper authority

and was necessary to serve certain enumerated and significant governmental interests of the Philadelphia Housing Authority;

B. The memorandum was neither vague nor overbroad, and the plaintiffs were fully aware of and understood the limitations it put on their activities; and

C. The plaintiffs, who were non-tenured employees of the Philadelphia Housing Authority, had no right to a prior hearing before their discharge.

On May 15, 1973, this Court granted the defendants' motion in part, and held that the memorandum in question was "neither vague nor overbroad nor violative of any constitutional right" and that the defendants' discharge of the plaintiffs was not unlawful because of the defendants' failure to give the plaintiffs a prior hearing. An evidentiary hearing was ordered on the plaintiffs' motion for a declaratory judgment that their firings were in violation of their right to freedom of speech and on the plaintiffs' motion for a permanent injunction compelling the defendants to rescind the plaintiffs' firings, and to restore them to their former employment with back pay plus six per cent interest and seniority retroactive to the dates of their firings.

The full and final evidentiary hearing was held on May 18, 1973, and the Court makes the following findings of fact and conclusions of law.

Findings of Fact.

1. The plaintiff Brenda Alderman is an adult citizen of the United States and a resident of the Commonwealth of Pennsylvania. Plaintiff Alderman was first hired by

the Philadelphia Housing Authority on July 10, 1972, as a Tenant Service Representative II (N. T. pp. 5-6). More specifically, she was hired to provide social services to tenants living in the public housing managed by the Philadelphia Housing Authority (N. T. p. 9). At the time her employment with the Philadelphia Housing Authority was terminated, her salary was $9,467.00 per annum (N. T. p. 24).

2. The plaintiff Floyd Smith is an adult citizen of the United States and a resident of the Commonwealth of Pennsylvania. Plaintiff Smith was first hired by the Philadelphia Housing Authority on April 20, 1970, as a Resident Aide Coordinator. More specifically, he was hired to work with teenagers who lived in public housing to help curb gang warfare in the areas to which he was assigned (N. T. p. 54). Mr. Smith's starting salary with the Philadelphia Housing Authority was $8,183.00 per annum (Exhibit P-7). Mr. Smith's salary at the time his employment was terminated by the Philadelphia Housing Authority was $9,635.00 per annum. See Affidavit of Floyd Smith, Exhibit "D", in Plaintiffs' Motion for Summary Judgment.

3. The plaintiff Jerri Williams is an adult citizen of the United States and a resident of the Commonwealth of Pennsylvania. Plaintiff Williams was first hired by the Philadelphia Housing Authority on October 26, 1971, as a Group Service Worker. More specifically, she was hired to help public housing tenants organize and run recreational, social and educational programs; a job she was doing as a volunteer before being hired by the Philadelphia Housing Authority (N. T. pp. 31-32). At the time plaintiff Williams' employment with the Philadelphia Housing Authority was terminated, her salary was $227.00, net, every two weeks (N. T. pp. 88-89).

4. The plaintiff Kay Deming is an adult citizen of the United States and a resident of the Commonwealth of Pennsylvania. Plaintiff Deming was first hired by the Philadelphia Housing Authority on January 10, 1972 as an Area Coordinator (N. T. pp. 69-70). More specifically, she was hired to provide coordination, training, staff development, and program supervision for the Social Services Programs run by the Philadelphia Housing Authority in their West Philadelphia projects (N. T. p. 71). At the time plaintiff Deming's employment with the Philadelphia Housing Authority was terminated, her salary was $13,300 per annum (N. T. p. 81).

5. The defendant, The Philadelphia Housing Authority, was created under the provisions of the Housing Authorities Law, Act of May 28, 1937, P. L. 955, 35 P. S. § 1541 et seq. for the primary purpose of providing safe and sanitary housing to low income persons (Answer ¶ 8).

6. The defendant Gilbert Stein was Executive Director of the Philadelphia Housing Authority from August 21, 1972 until February 20, 1973 (N. T. p. 119).

7. As Executive Director of the Philadelphia Housing Authority, Stein was chief executive officer of the Philadelphia Housing Authority and was in charge of all executive and administrative functions of the Philadelphia Housing Authority (Deposition of Gilbert Stein p. 4).

8. Each of the plaintiffs was employed by the Philadelphia Housing Authority as a probationary employee before each became a permanent status employee of the Philadelphia Housing Authority (N. T. pp. 7, 34, 56, 70, 71).

9. The plaintiffs Brenda Alderman and Jerrie Williams were, themselves, public housing tenants while they were employed at the Philadelphia Housing Authority (N. T. pp. 5, 6, 30).

10. The defendant Thomas J. Kelly is presently the Acting Executive Director of the Philadelphia Housing Authority (Answer ¶ 9).

11. The defendants Thomas McIntosh, Carmelita Larner, Frosteena Kee, and William Rafsky are presently the members of the Philadelphia Housing Authority's Board of Directors (Answer ¶ 10). The Board of Directors is responsible for setting the broad managerial policy of the Philadelphia Housing Authority (Exhibit P-17, pp. 4-6).

12. At the time Stein became Executive Director of the Philadelphia Housing Authority, the Philadelphia Housing Authority and the Resident Advisory Board were involved in an ongoing dispute as to whether the Resident Advisory Board properly represented tenants of the Philadelphia Housing Authority and whether it was responsive to those tenants' needs (N. T. pp. 122-133).

13. Shortly after he became Executive Director of the Philadelphia Housing Authority, Stein, at the request of members of the Philadelphia Housing Authority, entered into an investigation of the Resident Advisory Board to determine whether the Resident Advisory Board truly and properly represented Philadelphia Housing Authority tenants as it claimed, and whether it was responsive to the tenants' needs (N. T. pp. 117-133).

14. During the course of that investigation, Stein visited the Philadelphia Housing Authority's projects and personally conducted inspections and interviewed tenants (N. T. pp. 117-133).

15. That investigation revealed that many tenants believed that the Resident Advisory Board, far from representing their needs, was in a conspiracy with the Philadelphia Housing Authority to take advantage of the tenants and to perpetuate itself for its own self-aggrandizement

(N. T. pp. 122-133). This was confirmed in the mind of many tenants by the refusal of the Resident Advisory Board to deal with the dope pusher problem; the highly publicized conviction of Rose Wylie, the then head of the Resident Advisory Board, for extortion; and the fact that many Resident Advisory Board members were not Philadelphia Housing Authority tenants (N. T. pp. 122-133).

16. As a result of that investigation, and to fully and finally determine whether the Resident Advisory Board truly represented the tenants, Stein, in early October of 1972, proposed a free and open tenant plebiscite, said plebiscite to be held in December of 1972 (N. T. p. 132).

17. From its negotiations with the Resident Advisory Board, which had been continuing for some months prior to October of 1972, the Philadelphia Housing Authority felt certain, that the Resident Advisory Board would charge the Philadelphia Housing Authority with interfering with the tenants' election and seek to enjoin it. From at least two of Mr. Stein's personal experiences with the Resident Advisory Board, he felt certain that if the Philadelphia Housing Authority employees did campaign against the Resident Advisory Board, violence would erupt between the Philadelphia Housing Authority employees and the Resident Advisory Board advocates (N. T. pp. 122-133).

18. In this atmosphere and in anticipation of a suit by the Resident Advisory Board, Stein, in November of 1972, directed that the following memorandum ("the memorandum") be issued to all employees:

To: All Employees of The Philadelphia Housing Authority

FROM: Gilbert Stein, Executive Director

SUBJECT: Activities of PHA Personnel during the Tenants Election

No PHA employee shall engage in any form of interference during the upcoming tenant plebiscite to determine whether residents of PHA-managed properties want to be represented by the RAB Corporation (Resident Advisory Board of Philadelphia).

It is the policy of this Authority to encourage all tenants to exercise their right to choice . . . but there should be no attempt by PHA employees to discuss RAB politics with tenants, either pro or con.

Any employee who engages in such activity will be subject to immediate dismissal.

/s/ Gilbert Stein

I have read the above and understand that as an employee of The Philadelphia Housing Authority, I must abide by this restriction.

.....

Employee's Signature

(Exhibit P-2)

19. The purpose of the memorandum, the reasons for its issuance, and the governmental interests served by it, were as follows:

(a) The memorandum was issued to insure a free and open election without interference, either pro or con, by Philadelphia Housing Authority employees (N. T. pp. 131-137).

(b) The memorandum was issued to prevent violent confrontations of the type which had occurred on two prior occasions during disputes between the Philadelphia Housing Authority and the Resident Advisory Board (N. T. pp. 137, 148, 149).

(c) The memorandum was issued to protect the tenants' rights of freedom of expression and freedom of choice in representation with regard to the election (Affidavit of Gilbert Stein, N. T. pp. 131, 133-137).

(d) The Philadelphia Housing Authority tenants were dependent on social workers and other Philadelphia Housing Authority employees for the necessities of life, and would therefore be subject to intentional or unintentional coercion by the social workers and other Philadelphia Housing Authority employees to vote the way the tenant thought the Philadelphia Housing Authority employee wanted him or her to vote (Affidavit of Gilbert Stein, N. T. pp. 131, 133, and 137).

(e) If the Philadelphia Housing Authority employees were allowed to campaign for or against the Resident Advisory Board, the tenants might erroneously come to believe, or continue to believe, that the Resident Advisory Board and the Philadelphia Housing Authority were secretly acting in concert (N. T. pp. 133-140).

(f) The Philadelphia Housing Authority employees might devote their time and efforts to campaigning for or against the Resident Advisory Board, rather than devoting their energies to their regular duties (N. T. p. 137).

(g) The memorandum was necessary to preserve the Philadelphia Housing Authority's public integrity in that, the Philadelphia Housing Authority should not, through its employees or otherwise, take or appear to take a position, either way, with reference to the Resident Advisory Board election or controversy (N. T. pp. 133-137).

(h) If the Philadelphia Housing Authority employees were allowed to campaign during the election, the results of the election might be set aside (N. T. p. 165).

20. On December 5, 1972, as anticipated by the Philadelphia Housing Authority, the Resident Advisory Board and several individual Philadelphia Housing Authority tenants, not parties to this case, but rather suing on their own behalf and in a representative capacity for all Philadelphia Housing Authority tenants, brought suit in this Court naming the Philadelphia Housing Authority as defendant and seeking to enjoin the upcoming election. That suit was captioned: Resident Advisory Board of Philadelphia, Inc. v. Philadelphia Housing Authority, Civil Action No. 72-2399 ("the RAB case") (N. T. pp. 134, 136). As a result of the Resident Advisory Board litigation, the election scheduled for December of 1972 was called off by the Philadelphia Housing Authority. This cancellation took place on December 11, 1972 (N. T. p. 155; Exhibit P-18), and another election was scheduled for either April or May of 1973 (N. T. p. 164).

21. After extensive negotiations, the Philadelphia Housing Authority and the Resident Advisory Board entered into a stipulation dated December 11, 1972, approved by The Honorable Charles R. Weiner of this Court, which read in part as follows:

> The Philadelphia Housing Authority agrees that it will not take a position on the election provided for above. This shall not prevent PHA from answering any criticisms of its personnel or policies (Exhibit D-3).

22. In November of 1972, when the defendant Stein ordered his memorandum (P-2) circulated, he ordered his subordinate senior staff members to distribute the memo-

randum to all Philadelphia Housing Authority employees, to have said employees sign the memorandum, and to have the signed memorandum returned to Miss Karen Vandenhengle, who was at that time an Administrative Assistant in the Philadelphia Housing Authority personnel department (N. T. pp. 91-93, Exhibit P-17b, p. 75, Exhibit P-15).

23. As requested by her superiors, Miss Vandenhengle maintained records of all Philadelphia Housing Authority employees who did not sign the defendant Stein's memorandum (N. T. p. 93). Her records revealed that 65 to 70 Philadelphia Housing Authority employees failed to sign Mr. Stein's memorandum and, except for the four plaintiffs in this action, all of those 65 to 70 employees are still working for the Philadelphia Housing Authority and were not dismissed from their jobs for their failure to sign the defendant Stein's memorandum (N. T. pp. 93-95).

24. An examination of Miss Vandenhengle's records revealed that about 14 persons out of the 65-70 gave "reasons" why they had not signed (Exhibit P-16). These "reasons" included the fact that the 14 persons may have been on annual leave (vacation) or sick leave (N. T. pp. 100-102, 108).

25. A few days prior to December 8, 1972, each of the plaintiffs—Alderman (N. T. pp. 9-12), Williams (N. T. p. 36), Smith (N. T. p. 57), and Deming (N. T. p. 73)—received the Stein memorandum, and each refused to sign it or return it as instructed.

26. Although they refused to sign the memorandum (Exhibit P-2), none of the plaintiffs, in fact, ever interfered in the Resident Advisory Board election referred to in the memorandum, nor did any of the plaintiffs, in fact, ever discuss the election or Resident Advisory Board politics, pro or con, with public housing tenants prior to their dismissal (Alderman, N. T. pp. 12-13), (Williams, N. T. pp.

43-44), (Smith, N. T. pp. 63-64), (Deming, N. T. pp. 79-80). See also N. T. pp. 147-148.

27. The plaintiff Kay Deming responded to Stein's memorandum by setting down in a lengthy letter, delivered to Miss Vandenhengle, her reasons why she would not sign the memorandum (N. T. pp. 73-74, Exhibit P-12). However, she never received a response to that letter (N. T. p. 74).

28. On December 19, 1972, eight days after the Resident Advisory Board election was called off, Kay Deming was called into the office of the personnel director and told that she was fired (N. T. p. 76, Exhibit P-13). The defendant Stein later told Miss Deming that she was fired for failing to sign the memorandum in question (N. T. pp. 77-78, 138).

29. None of the other three plaintiffs received any word from the Philadelphia Housing Authority about their failure to sign the memorandum (Exhibit P-2), until they were telephoned on December 27, 1972 and told to report to the office of Natalie Danowsky, the Director of Social Services. At the time of the phone call, each of the plaintiffs were on the job at the Philadelphia Housing Authority, except for Jerri Williams, who was at home on annual leave (N. T. pp. 37-39). When each plaintiff arrived to speak to Miss Danowsky, they were each handed a letter advising them that they had failed to sign the memorandum and that they must sign it or be fired (Alderman, N. T. pp. 14, 18-19, Exhibit P-3), (Williams, N. T. pp. 37-39), (Smith, N. T. pp. 58-59, Exhibit P-8). In addition, the letter stated that each of the plaintiffs would be placed on three months probation even if they did sign the memorandum (Exhibits P-3 and P-8).

30. Brenda Alderman made repeated attempts to talk with the defendant Gilbert Stein before the December 29, 1972 deadline, but she was unsuccessful. She believed that

under certain conditions, she could have signed the memorandum. Miss Alderman was eventually able to speak to the defendant Stein on January 4, 1973, about her dismissal, but he refused to discuss the matter with her (N. T. p. 22). On January 5, 1973, she received notice that she had been terminated from her job as of December 27, 1972 (N. T. pp. 20-21, Exhibit P-4). The plaintiff Brenda Alderman was dismissed from her job because she would not sign Mr. Stein's memorandum (N. T. pp. 22, 138, Exhibit P-5).

31. The plaintiff Jerri Williams assumed that she would be fired as of December 29, 1972 if she refused to sign the memorandum. She heard nothing further from the Philadelphia Housing Authority until, by phone, in January, she made arrangements to pick up her final paycheck (N. T. 40-41). In fact, Mrs. Williams was dismissed from her job at the Philadelphia Housing Authority as of December 29, 1972, because she failed to sign the memorandum (N. T. pp. 40-41, 138, Exhibit P-6).

32. The plaintiff Floyd Smith did not sign the "memorandum" as a result of his discussion with Miss Danowsky (N. T. p. 61). However, believing that the memorandum might be associated with the then pending Resident Advisory Board v. Philadelphia Housing Authority lawsuit, he decided to sign the memorandum if Miss Danowsky would agree that, as she led him to believe, the memorandum and the lawsuit were connected to one another (N. T. pp. 62-64). To indicate his willingness to sign, he delivered a letter to the Philadelphia Housing Authority receptionist on December 29, 1972, since Miss Danowsky had left for the day. Mr. Smith never received a response to his letter (N. T. pp. 62-63, Exhibit P-9). While Mr. Smith never received any formal notice of his dismissal, he was dismissed as of December 29, 1972 for his failure to sign the memorandum (N. T. pp. 64-65, 138, Exhibit P-10).

33. On May 9, 1973, this Court, through the Honorable Charles R. Weiner, entered an order in the Resident Advisory Board case which, in part, enjoined the Philadelphia Housing Authority and its employees from uttering any written or oral statement regarding its opinion or preference in the upcoming Resident Advisory Board election. The pertinent part of that order provides as follows:

> Neither through "The Good Neighbor" or any other written or published notice or statement, nor through any oral statement issued or made in any manner by the Philadelphia Housing Authority *or any of its employees,* shall the Housing Authority make known or otherwise publish to the public housing tenants its opinion or preference as to the persons or organizations which shall represent the public housing tenants or their dealings with the Housing Authority, nor shall the Housing Authority offer any promise or benefit to any person for the purpose of influencing any eligible voter on how he shall cast his vote (N. T. pp. 166-167, Emphasis supplied).

34. By issuing the above quoted order, Judge Weiner indicated that the enjoining of interference with reference to the Resident Advisory Board election was proper and constitutional, and served a significant interest, i.e. a free and open election, which far outweighed any infringement upon the rights of Philadelphia Housing Authority employees.

35. More Philadelphia Housing Authority employees were disposed to campaign against the Resident Advisory Board than in favor of it (N. T. pp. 139-140).

36. In mid November of 1972, Stein directed that all Philadelphia Housing Authority employees, without exception, be told that if they did not sign the memorandum by

December 26, 1972, they would be suspended until December 29, 1972, without pay. If they did not sign the memorandum by December 29, 1973, they would be discharged (Exhibit B to the Complaint).

37. Stein himself signed the memorandum (N. T. p. 162).

38. Of the more than 1,300 employees of the Philadelphia Housing Authority, the records of the Philadelphia Housing Authority show that only the plaintiffs herein *refused* to sign the memorandum; although, approximately 65 other Philadelphia Housing Authority employees did not return the memorandum to Karen Vandenhengel. The Philadelphia Housing Authority records do not show that these 65 refused to sign the memorandum, but rather that most of the 65 were either on sick leave, annual leave, or shift work (N. T. pp. 93-97).

39. The memorandum in question is neither vague nor overbroad. Its import and restrictions were understood by the plaintiffs (Order of this Court dated May 15, 1973 dismissing Count II of the Complaint).

40. All four plaintiffs understood the meaning and import of the memorandum and they further understood that if they did not sign the memorandum, they would be discharged.

41. The plaintiff Brenda Alderman was, at the time the memorandum in question was issued, and at the time of her dismissal, a nontenured employee of the Philadelphia Housing Authority (N. T. pp. 7-9).

42. Alderman was a graduate of the University of Illinois with a Bachelor of Science degree in Social Welfare (N. T. p. 24).

43. At the time of her dismissal, Brenda Alderman was not a public housing tenant (N. T. p. 5).

44. Brenda Alderman was familiar, or should have been familiar, with the "RAB politics" to which the memorandum referred (N. T. p. 6).

45. Brenda Alderman received the memorandum and was asked to sign it (N. T. p. 10).

46. Brenda Alderman refused to sign the memorandum (N. T. p. 14).

47. Brenda Alderman was given an opportunity to explain her reasons for not signing the memorandum and to ask questions about it (N. T. p. 14).

48. Brenda Alderman again refused to sign the memorandum, and as a result of her refusal, she was discharged on December 27, 1972 (N. T. pp. 20-21, Exhibit P-4).

49. Alderman did not make any attempt to seek employment until February of 1973. Thereafter, she spent most of her time home reading (N. T. p. 29).

50. The plaintiff Jerri Williams was at the time the memorandum in question was issued, and at the time of her dismissal, a nontenured employee of the Philadelphia Housing Authority (N. T. p. 31).

51. Jerri Williams served as president of the Norris Tenant Council from 1968 until 1970. The Norris Tenant Council is associated with the Resident Advisory Board (N. T. p. 46).

52. Jerri Williams was employed by the Resident Advisory Board from March of 1969 through June of 1969 (N. T. p. 45).

53. Jerri Williams was familiar, or should have been familiar, with the "RAB politics" to which the memorandum referred (N. T. pp. 45-47).

54. Jerri Williams was asked to sign the memorandum (N. T. pp. 35-36).

55. Jerri Williams refused to sign the memorandum (N. T. p. 36).

56. Jerri Williams was given an opportunity to explain her refusal to sign the memorandum and ask questions about it (N. T. pp. 36-37).

57. Jerri Williams was again asked to sign the memorandum (N. T. pp. 36-37).

58. Jerri Williams again refused to sign the memorandum, and as a result, she was discharged by the Philadelphia Housing Authority on December 29, 1972 (N. T. pp. 37, 40-41).

59. Jerri Williams did not begin to look for work until two weeks after her dismissal (N. T. pp. 46-47).

60. Jerri Williams again worked for the Resident Advisory Board from February of 1973 until April 30 of 1973, when she was terminated because of frequent absences (N. T. pp. 46-47).

61. On May 18, 1973 (the day of the hearing in this case), Jerri Williams was again a member of the Norris Homes Tenant Council which is associated with the Resident Advisory Board (N. T. pp. 49-50).

62. The plaintiff Kay Deming was at the time the memorandum in question was issued, and at the time of her dismissal, a nontenured employee of the Philadelphia Housing Authority (N. T. pp. 69-70).

63. Kay Deming is a graduate of Louisiana State University with a bachelor's degree in Secondary Educa-

tion, and she has one year towards a master's degree in Social Work from the Bryn Mawr Graduate School of Social Work (N. T. p. 69).

64. Kay Deming distributed the memorandum in question to the employees under her supervision including plaintiff Floyd Smith and asked them to sign it (N. T. pp. 56-57, 72, 82-83).

65. At the time of the distribution of the memorandum, Kay Deming was familiar or should have been familiar with the "RAB politics" to which the memorandum referred (N. T. pp. 69, 80-81).

66. Kay Deming was asked to sign the memorandum (N. T. pp. 71-73).

67. Kay Deming refused to sign the memorandum (N. T. p. 73).

68. Kay Deming was given an opportunity to express her reasons for refusing to sign the memorandum and to ask questions about it (N. T. pp. 73-74).

69. Kay Deming again refused to sign the memorandum, and as a result of this, she was discharged by the Philadelphia Housing Authority on January 2, 1973 (N. T. pp. 73-74, 76).

70. Since February 12, 1973, Kay Deming has been employed by the Pennsylvania Social Services Union (N. T. pp. 80-81).

71. The plaintiff Floyd Smith was at the time the memorandum in question was distributed, and at the time of his dismissal, a nontenured employee of the Philadelphia Housing Authority (N. T. p. 54).

72. Until October of 1972, Floyd Smith was a member of the Resident Advisory Board (N. T. p. 67).

73. Floyd Smith served as president of a Tenant Council affiliated with the Resident Advisory Board (N. T. p. 67).

74. At the time of the distribution of the memorandum, Floyd Smith was familiar or should have been familiar with the "RAB politics" mentioned in the memorandum (N. T. p. 67).

75. Floyd Smith was asked to sign the memorandum (N. T. pp. 56-57).

76. Floyd Smith refused to sign the memorandum (N. T. p. 57).

77. Floyd Smith was given an opportunity to express his reasons for refusing to sign the memorandum and to ask questions about it (N. T. p. 58).

78. Floyd Smith was again asked to sign the memorandum (N. T. p. 58).

79. Floyd Smith again refused to sign the memorandum and as a result of this, he was dismissed by the Philadelphia Housing Authority on December 29, 1972 (N. T. pp. 61, 64-65).

80. Floyd Smith is employed at the Mantua Community Center and is attending the Wharton School of the University of Pennsylvania three nights a week (N. T. pp. 66-69).

81. The defendant Gilbert Stein ceased being Executive Director of the Philadelphia Housing Authority on February 20, 1973. At no time after the issuance of the memorandum in question, and while he was in the office of Executive Director, did Stein discuss "RAB politics" with tenants or interfere in an election involving the Resident Advisory Board (N. T. p. 138).

DISCUSSION.

In mid-November of 1972, the Philadelphia Housing Authority circulated the following memorandum to *all* of its employees:

> No PHA employee shall engage in any form of interference during the upcoming tenant plebiscite to determine whether residents of PHA-managed properties want to be represented by the RAB Corporation (Resident Advisory Board of Philadelphia).
>
> It is the policy of this Authority to encourage all tenants to exercise their right of choice . . . but there should be no attempt by PHA employees to discuss RAB politics with tenants, either pro or con.
>
> Any employee who engages in such activity will be subject to immediate dismissal.
>
> /s/ GILBERT STEIN

I have read the above and understand that as an employee of the Philadelphia Housing Authority, I must abide by this restriction.

_____

Employee's Signature

Gilbert Stein, the then Executive Director of the Philadelphia Housing Authority, instructed his staff to discharge any Philadelphia Housing Authority employee who refused to sign the memorandum and abide by its terms. Each of the plaintiffs, all of whom were employees of the Philadelphia Housing Authority, *refused* to sign the memorandum, even after personal interviews with their supervisors, and in the case of Brenda Alderman and Kay Deming, after personal interviews with Gilbert Stein.

The purpose of the memorandum, and the Philadelphia Housing Authority's interest served by it, are intimately related to a long-standing controversy between the Philadelphia Housing Authority and the Resident Advisory Board. That controversy eventually came before the Honorable Charles R. Weiner of this Court in a case captioned Resident Advisory Board of Philadelphia, Inc., et al. v. The Philadelphia Housing Authority, U. S. D. C. E. D. Pa., Civil Action No. 72-2399 ("The RAB case"). The history of that case is as follows:

In August of 1972, shortly after he was appointed Executive Director of the Philadelphia Housing Authority, Gilbert Stein, at the request of the Philadelphia Housing Authority Board of Directors, entered into an investigation of the Resident Advisory Board to determine whether the Resident Advisory Board truly represented the Philadelphia Housing Authority tenants as it claimed, and whether it was responsive to tenants' needs. This investigation disclosed that many tenants believed that the Resident Advisory Board, far from representing their needs, was in a conspiracy with the Philadelphia Housing Authority to take advantage of them and to perpetuate itself for its own self-aggrandizement. This was confirmed in many tenants' minds by the refusal of the Resident Advisory Board to deal with "dope pushers" and the highly-publicized conviction of Rose Wylie, then head of the Resident Advisory Board, for extortion. It was a firm belief of many tenants that the Philadelphia Housing Authority not only acquiesced in the Resident Advisory Board's illicit activities, but encouraged them. The Resident Advisory Board, on the other hand, charged the Philadelphia Housing Authority with interference in its right to represent tenants.

To finally and fully determine whether the Resident Advisory Board truly represented the Philadelphia Hous-

ing Authority tenants, the Philadelphia Housing Authority, in early October of 1972, proposed a free and open plebiscite to take place in December of 1972. It was clear to the Philadelphia Housing Authority, from its negotiations with the Resident Advisory Board, which had been continuing for some months prior thereto, that the Resident Advisory Board would charge the Philadelphia Housing Authority with interfering with the election and seek to enjoin it. It was also clear to Mr. Stein, based on two personal experiences with the Resident Advisory Board, that if Philadelphia Housing Authority employees did campaign against the Resident Advisory Board, violence would erupt between those employees and the Resident Advisory Board advocates.

It was in this atmosphere, and in anticipation of a lawsuit by the Resident Advisory Board, that the above quoted memorandum was circulated among Philadelphia Housing Authority employees. The purpose of the memorandum was to:

(a) Insure a free and open election without interference, either pro or con, by Philadelphia Housing Authority employees;

(b) Prevent charges that the Philadelphia Housing Authority attempted to influence the votes of tenants in the election, charges which if proven could void the election;

(c) Prevent disruption of services by the Philadelphia Housing Authority to tenants which might be caused by the political campaigning of Philadelphia Housing Authority employees in the election;

(d) Prevent disruption and even violence which might be caused by Philadelphia Housing Authority employees' interference in the election; and

> (e) Protect Philadelphia Housing Authority tenants' rights of free speech, free association, and due process. Many tenants of the Philadelphia Housing Authority are dependent for their subsistence upon welfare payments and social welfare services administered by Philadelphia Housing Authority employees. To have permitted those Philadelphia Housing Authority employees to campaign, either for or against the Resident Advisory Board, might have caused the tenant to believe that if a tenant did not vote the way his social worker directed him to vote, his welfare benefits and services would be terminated, thereby creating an impermissible "chilling effect" upon the tenant's constitutional rights.

On December 5, 1972, as anticipated by the Philadelphia Housing Authority, the Resident Advisory Board brought an action against the Philadelphia Housing Authority seeking an injunction to prohibit the pending election. After extensive negotiations, the parties entered into a stipulation which was approved by Judge Weiner.

Paragraph 5 of that stipulation formalized the Philadelphia Housing Authority's undertaking not to participate in the election, and provided in part:

> The Philadelphia Housing Authority agrees that it will not take a position in the election provided for above.

Compliance with the stipulation necessarily required the full cooperation and assistance of all Philadelphia Housing Authority employees, since the Philadelphia Housing Authority, like any other organization, can act only through its officers and employees.

Thereafter, on May 9, 1973, Judge Weiner entered an Order in "the RAB case" which, in part, enjoined the

Philadelphia Housing Authority and its employees from uttering any written or oral statement regarding its opinion or preference in the upcoming Resident Advisory Board election. The pertinent part of that Order provides as follows:

> Neither through "The Good Neighbor" or any other written or published notice or statement, *nor through any oral statement* issued or made in any manner by the Philadelphia Housing Authority or any of its employees, shall the Housing Authority make known or otherwise publish to the public housing tenants its opinion or preference as to the persons or organizations which shall represent the public housing tenants or their dealings with the Housing Authority. Nor shall the Housing Authority offer any promise or benefit to any person for the purpose of influencing any eligible voter on how he shall cast his vote. (Emphasis supplied.)

The stipulation, and especially Judge Weiner's injunction in "the RAB case", are of great significance to the instant case. They both are evidence that this Federal District Court believed that enjoining interference with the Resident Advisory Board election was proper and constitutional and served a significant governmental interest of the Philadelphia Housing Authority which far outweighed any infringement upon the rights of the Philadelphia Housing Authority employees.

This Court, by Order of May 15, 1973, found that the memorandum in question was neither vague nor overbroad. Each of the plaintiffs understood its import, and each was fully aware of the Philadelphia Housing Authority's sensitive position, and later each became aware of the stipulation with the Resident Advisory Board and the injunction

against the Philadelphia Housing Authority. Nevertheless, after being given several opportunities to sign the memorandum, the plaintiffs refused to signify their willingness to abide by the memorandum's terms. As a result, they were discharged from the Philadelphia Housing Authority.

The plaintiffs now claim that their dismissal was violative of their right to freedom of speech, and that they should be reinstated with back pay. Two recent Supreme Court decisions are dispositive of this case. In *United States Civil Service Commission, et al. v. National Association of Letter Carriers, AFL-CIO, et al.*, — U. S. —, 37 L. Ed. 2d 796, 93 S. Ct. — (June 25, 1973), and *William M. Broadrick, et al. v. State of Oklahoma, et al.*, — U. S. —, 37 L. Ed. 2d 830, 93 S. Ct. — (June 25, 1973), the United States Supreme Court reaffirmed the government's right to restrict the speech of its employees.

In the *Letter Carriers* case, the Supreme Court reversed the decision in *National Association of Letter Carriers v. United States Civil Service Commission*, 346 F. Supp. 578 (D. D. C. 1972), which was heavily relied upon by the plaintiffs therein and reaffirmed the government's right to restrict the political activities of its employees under the Hatch Act, 5 U. S. C. A. § 7323(a)(2). In rejecting the plaintiffs' contention that the Hatch Act prohibition on political activity was unconstitutional on its face, the Supreme Court, quoting from *Pickering v. Board of Education*, 391 U. S. 563, 568 (1968), held that:

> The government has an interest in regulating the conduct and "the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the

interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act. 37 L. Ed. 2d 808.

The Court went on to hold that:

> Neither the right to associate nor the right to participate in political activities is absolute in any event. See e.g. *Rosario v. Rockefeller,* — U. S. — (1973); *Dunn v. Blumstein,* 405 U. S. 330, 336 (1972); *Bullock v. Carter,* 405 U. S. 134, 140-141 (1972); *Jenness v. Fortson,* 403 U. S. 431 (1971); *Williams v. Rhodes,* 393 U. S. 23, 30-31 (1968). (37 L. Ed. 2d 810).

In the instant case, the Philadelphia Housing Authority had a significant and immediate governmental interest in preventing interference with the Resident Advisory Board plebiscite. Conversely, the plaintiffs claim that they did not even intend to discuss Resident Advisory Board politics, let alone, to interfere with the election. The only reason why the plaintiffs refused to sign the memorandum was because they "thought" that it infringed on their absolute right to freedom of speech. On the one hand, we have the possibility of riots, contempt citations for violations of stipulations and injunctions, coercion of tenants, and the loss of trust of tenants with their landlord; while on the other hand, we have a right which the plaintiffs, by their own testimony, admitted that they did not intend to exercise.

In both *Broadrick* and the *Letter Carriers* case, the Supreme Court held that the usual strict standards of first amendment scrutiny are relaxed where the restriction, as is

found in the memorandum herein, applies evenhandedly to the expression of various opposing views.

> The restrictions so far imposed on federal employees are not aimed at particular parties, groups or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls. *Letter Carriers,* 37 L. Ed. 2d 808. See also *Broadrick,* 37 L. Ed. 2d 841.

In the case at bar, the second paragraph of the memorandum prohibits *all* Philadelphia Housing Authority employees from discussing Resident Advisory Board politics with tenants, *either pro or con.* The restriction, therefore, applied evenhandedly to all employees and was not aimed at persons partisan to the Resident Advisory Board or their point of view. In fact, as Gilbert Stein testified, but for the memorandum, an overwhelming majority of Philadelphia Housing Authority employees would have campaigned against the Resident Advisory Board. It should also be noted that even the administrators of the Philadelphia Housing Authority, including its Executive Director, signed the memorandum. This is in direct contrast to the Hatch Act, which excludes high executives.

It may be argued by the plaintiffs that approximately 65 to 70 Philadelphia Housing Authority employees from the over 1300 employees of the Philadelphia Housing Authority may not have signed the memorandum. If this is so, it was not through the fault or lack of effort by Gilbert Stein or with his knowledge. His strict orders were that *all* employees sign the memorandum. Furthermore, there was no clear evidence that those persons did not, in fact,

sign the memorandum. There was no evidence at all that they affirmatively refused, as did these plaintiffs, to sign it. In fact, there is no Philadelphia Housing Authority employee who refused to sign the memorandum that was not treated as were these plaintiffs.

In the *Letter Carriers* case, the Supreme Court rejected the contention that the government's legitimate interest extends only to prohibiting outright coercion or electioneering after it occurs:

> [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they *appear* to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent. 37 L. Ed. 2d 809 (Emphasis supplied).
>
> It may be urged that prohibitions against coercion are sufficient protection; but for many years joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to his job and his political acts and beliefs it is not enough merely to forbid one employee from attempting to influence or coerce another. 37 L. Ed. 2d 809 (Emphasis supplied).

In accord with this view is Professor Emerson of Yale Law School, a well known civil libertarian. "Insofar as the political activity of an employee results in failure to perform his duties, or a conflict of interest, *or even an appearance of conflict,* his conduct is subject to control without abridgment of the First Amendment." Emerson's *The System of Freedom of Expression,* 592. (Emphasis supplied). It is hard to conceive of what would create a greater appearance of conflict than employees of the Philadelphia

Housing Authority campaigning for or against the Resident Advisory Board. "To some extent," Professor Emerson continues, "these controls can be imposed by *advance rule* rather than merely by subsequent sanction." *Idem* (Emphasis supplied).

In the case at bar, as was testified to by Gilbert Stein, the Philadelphia Housing Authority tenants believed that the Resident Advisory Board and the Philadelphia Housing Authority were working hand in glove to defraud and take advantage of the tenants. The plebiscite in question was to restore tenants' confidence in the Philadelphia Housing Authority and to assure them that only persons of their choice would represent them. It was imperative to avoid even the appearance of interference, as well as actual interference. Non interference, and the appearance of non interference, was also necessary because of the Resident Advisory Board's contention that the Philadelphia Housing Authority would use its position with the tenants to influence them to vote against the Resident Advisory Board.

Finally, it should be noted that the restrictions under the Hatch Act were upheld although they applied to millions of federal and state employees, and to any and all partisan causes and candidates, and for an indefinite length of time. The restriction which the plaintiffs herein attack applies only to one controversy, to one election campaign, to the employees of only one government agency, and to last only a matter of months.

This Court must conclude that if the restrictions imposed by the Hatch Act are constitutional, the much narrower restrictions imposed by "the memorandum" are also constitutional and lawful on their face.

The Hatch Act is a clear prior restraint on free speech in that it affects an employee's freedom of expression starting at the moment they enter government service, well in advance of any actual speech or misconduct. The Hatch

Act, according to Professor Emerson, "operates as a broad *prior* control, cutting off beforehand political conduct of almost every description except voting, without regard to the specific impact in any particular case." Emerson, *The System of Freedom of Expression,* 583 (1970) (Emphasis supplied). Therefore, just as the Hatch Act has been held to be constitutional, i.e. not violative of the First Amendment right of freedom of speech, so must this memorandum be held to be constitutional and non violative of the First Amendment.

Although the plaintiffs admit that the Philadelphia Housing Authority has the right to proscribe the conduct to which the memorandum was aimed, they assert that "[t]here can be no prior restraint on the individuals right to speak. . . . [T]here has, to date, been no decision of any Court which has ultimately affirmed a prior restraint on free speech." (Plaintiffs' memorandum of law in support of their motion for summary judgment, p. 3).

This is not the case. "It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid." *Times Film Corporation v. Chicago,* 365 U. S. 43, 47 (1961). "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books v. Brown,* 354 U. S. 436, 441 (1957).

There are many leading decisions of the United States Supreme Court which have upheld prior restraints on freedom of speech. See for example *Times Film Corporation v. Chicago,* supra, where the Supreme Court upheld a system of censorship of motion pictures; *Kingsley Books v. Brown,* supra, where the Supreme Court upheld a system of injunctions against the sale and distribution of allegedly obscene books; *Giboney v. Empire Storage and Ice Company,* 336 U. S. 490 (1949) and *Hughes v. Superior Court,* 339 U. S. 460 (1949) where the Court upheld injunctions

against peaceful picketing; *Ferris v. Frohman,* 223 U. S. 424 (1912), where the Court upheld an injunction against the performance of a play which violated the common law of copyright; and *International News Service v. Associated Press,* 248 U. S. 215 (1918) where the Supreme Court upheld an injunction against the distribution of pirated news releases, even though this pirating was not prohibited by the copyright laws. The Supreme Court has also upheld injunctions against speech in *Gompers v. Buck's Stove & Range Company,* 221 U. S. 418 (1911) and in *E. I. DuPont d'Nemours Powder Company v. Masland,* 244 U. S. 100 (1917), and an injunction against the distribution of confidential price quotations in *Board of Trade v. Christie Grain & Stock Company,* 198 U. S. 236 (1905).

The prior restraint cases cited by the plaintiffs deal with the narrow problem of governmental restrictions on the means of *mass communication.* For example, the plaintiffs rely heavily on *New York Times, Inc. v. United States,* 403 U. S. 713 (1971). That case did not condemn all prior restraints, nor even all governmental injunctions against newspapers. The Supreme Court in a short per curiam opinion simply concluded that the government had not demonstrated that it was entitled to an injunction in that particular case. In their separate opinions, only two of the nine Justices, i.e. Justice Black and Justice Douglas, even took the position that injunctions against newspapers, let alone all prior restraints, were prohibited. Justices Stewart, White, and Marshall denied the injunction on the facts of that case and relied heavily on the deliberate refusal of Congress to authorize injunctions against the publication of classified information. 403 U. S. at 730 (Stewart, J. concurring), *id.* at 731-32 (White, J. concurring), *id.* at 741-43 (Marshall, J. concurring). Three of the Justices, of course, would have allowed the injunction even in the New York Times case. Not one of the Justices stated that

all prior restraints on any form of expression were invalid.

The doctrine of freedom from prior restraint, in its original formulation by Blackstone, applied only to the press. The doctrine was in a sense a call to freedom of the press in the wake of a statutory printers' monopoly in sixteenth century England which required that any work be licensed before it could be printed. Emerson, "The Doctrine of Prior Restraint," 20 *Law and Contemporary Problems,* 648 (1955) at 650-51.

"Apart from occasional routine statements of principle the Court did not invoke the doctrine until, in 1931, it decided the case of *Near v. Minnesota,*" 283 U. S. 697 Emerson, "The Doctrine of Prior Restraint", at 652. This leading case on the doctrine of prior restraint relied on the role of the press in exposing the malfeasance of public officials. 283 U. S. at 718-19.

In the *New York Times* case, *supra,* the Supreme Court was careful to note that it was dealing with the unique role of the press. Thus Justice Black stated: "In my view it is unfortunate that some of my Brethen are apparently willing to hold that the publication of *news* may sometimes be enjoined." 403 U. S. at 715. (Emphasis supplied). Justice Douglas stated: The First Amendment "leaves, in my view, no room for governmental restraint on the *press.*" 403 U. S. at 720 (Emphasis supplied). Justice Brennan stated: "But the First Amendment tolerates absolutely no prior judicial restraints of the *press* predicated upon surmise or conjecture that untoward consequences may result." 403 U. S. at 725-26 (Emphasis supplied). Justice Stewart stated: "For without an informed and free *press* there cannot be an enlightened people." 403 U. S. at 728 (Emphasis supplied). Justice White stated: "I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by

the *press* under our Constitutional System". 403 U. S. at 730-31. (Emphasis supplied). Justice Marshall believed that the ultimate issue was "whether this Court or the Congress has the power to make law," and discussed that problem rather than the First Amendment. 403 U. S. at 741. The three dissenting Justices, of course, would have allowed an injunction even where the press is concerned.

The four other cases relied upon by the plaintiffs likewise deal with mass communications: *Organization For a Better Austin v. Keefe,* 402 U. S. 415 (1971), (public distribution of leaflets); *Carroll v. President and Commissioners of Princess Anne,* 393 U. S. 175 (1968), (an ex parte injunction against a *public* rally); *Bantam Books v. Sullivan,* 372 U. S. 58 (1963), (censorship of books); and *Near v. Minnesota,* 283 U. S. 697 (1931), (a newspaper). None of these cases involve public employees whose right to freedom of expression, the Supreme Court has repeatedly held, may be restricted to a greater extent than that of independent citizens.

Lest any impression remain that *New York Times, supra,* outlawed all prior restraints even on mass communications, the United States Supreme Court on June 21st of this year in *Paris Adult Theatre I v. Slaton,* — U. S. —, 37 L. Ed. 2d 446, 93 S. Ct. — (1973), upheld an ex parte injunction against an obscene film. In this decision, the Court greatly expanded the definition of obscenity and the amount of material constitutionally subject to prior restraint.

Therefore, the plaintiffs' position that all prior restraints are unconstitutional is untenable.

The Philadelphia Housing Authority, like all governmental agencies, has a continuing interest in maintaining the *appearance,* as well as the fact, of impartiality, and in preventing its employees from engaging in politick-

ing rather than doing their jobs. In view of the Supreme Court's recent decisions in *Broadrick, supra,* and *Letter Carriers, supra,* this interest alone is sufficient to justify substantial restrictions on the employees' freedom of expression.

In the case at bar, there are even more compelling reasons for maintaining the *appearance,* as well as the fact, of "non-interference" than in the Hatch Act cases. Here, as Gilbert Stein testified, the tenants were long under the impression that the Philadelphia Housing Authority and the Resident Advisory Board had been conspiring to defraud and take advantage of them (N. T. pp. 124-126). If that impression were to be rectified, and confidence restored in the Philadelphia Housing Authority, and in a tenant's right to choose freely whom he wanted to represent him, it was imperative that the election appear, as well as in fact be, free of influence by the Philadelphia Housing Authority and by Philadelphia Housing Authority employees.

Moreover, Stein issued the memorandum not only because he was convinced that the interest of the Philadelphia Housing Authority required that its employees not interfere with the election, but also because he was convinced that compliance with the memorandum was necessary to protect the Philadelphia Housing Authority's tenants' rights of freedom of speech and due process. Many tenants of the Philadelphia Housing Authority are dependent upon the Philadelphia Housing Authority for their social welfare services. These services are administered by Philadelphia Housing Authority employees. To have permitted those employees to campaign, either for or against the Resident Advisory Board, might have caused the tenant to believe that if he did not vote the way his social worker directed him to vote, his welfare services

would be terminated, thereby creating an impermissible "chilling effect" upon the tenant's constitutional rights (N. T. pp. 131-132).

For similar reasons, Congress has imposed, and the Supreme Court has repeatedly upheld, broad restraints on the rights of employers to politic in union representation elections under the National Labor Relations Act. Employers and their agents are even prohibited from making some statements which are, on their face, merely disinterested expressions of opinion: 29 U. S. C. A. § 158(b)(1). See *NLRB v. Gissel Packing Co.*, 395 U. S. 575, 617-18 (1969).

Furthermore, it had been the Resident Advisory Board's contention that the Philadelphia Housing Authority would attempt to interfere with the election. As a result, the Philadelphia Housing Authority and the Resident Advisory Board entered into a stipulation, approved by Judge Weiner, that the Philadelphia Housing Authority would not interfere with the election (N. T. pp. 134-137). The Philadelphia Housing Authority could only adhere to its commitment to the Court and to the Resident Advisory Board if its employees agreed not to interfere with the election.

In "the RAB case" Judge Weiner entered an injunction preventing the Philadelphia Housing Authority or its employees from expressing any opinion to the tenants or others regarding the election involving the Resident Advisory Board. This injunction is of great significance to the instant case. It not only establishes that a Judge of this Court believed there may be a valid restraint on speech, and indeed Judge Weiner's Order is a restraint on speech, but also, that Order establishes that the Philadelphia Housing Authority had a significant, compelling, and valid governmental interest in preventing its employees

from interfering with the election or discussing Resident Advisory Board politics, pro or con. In this connection, it should be noted and emphasized that this Court has held that the memorandum to the Philadelphia Housing Authority employees was neither vague nor overbroad.

On page 3 of their Reply Brief, the plaintiffs' concede that "a prior restraint is not *necessarily* unconstitutional under *all* circumstances." (Emphasis in the original). With this basic and fundamental proposition established, the question becomes whether a significant and compelling governmental interest is sufficient to impose and justify a restraint on speech.

The plaintiffs argue that no matter what the reason, even if it is to prevent certain violence, intimidation, or severe encroachment on the constitutional rights of others, there can be no prior restraint on speech except when the nation is at war. In support of this extreme view, they cite *Times Film Corp. v. Chicago,* 365 U. S. 43 (1961) and *Freedman v. Maryland,* 380 U. S. 51 (1965).

In *Times Film,* the Supreme Court held that prior restraints are constitutionally permissible and that the dissemination of a movie could be restrained prior to even its first showing. See 365 U. S. at 46. The Court held that the plaintiff movie exhibitor could not unleash a general and broadside attack on a system of prior restraints by withholding his film from inspection by state administrative agencies (365 U. S. at 50), but rather he had to submit the film to state inspection, and then bring suit only if his film was wrongly rejected.

The plaintiffs herein have testified that they did not refuse to sign the memorandum in question because they intended to interfere in the Resident Advisory Board election, but rather because they did not know what behavior it proscribed. This Court held that the memorandum was

not vague or overbroad. The plaintiffs, therefore, knew, or should have known, what restraints it imposed on their behavior.

If plaintiffs' testimony is true, and they did not intend to interfere with the election, their only purpose in not signing the memorandum must have been to make a "broadside attack" on the constitutionality of the restraint. Such an attack was held to be impermissible under *Times Film.*

In *Freedman v. Maryland,* the Supreme Court was careful not to disturb its holding in *Times Film Corp.* See 380 U. S. at 53-54. The Court in *Freedman* held that even a broad statewide system of censorship of *mass communication* should not be automatically struck down without careful inquiry into its purpose and specific operations.

Although the plaintiffs admit that a prior restraint may be valid, they assert that the cases cited by the defendants do not deal with prior restraints on *speech.* The plaintiffs cite as examples *Kingsley Books v. Brown,* 354 U. S. 436 (1957); *Giboney v. Empire Storage and Ice Co.,* 336 U. S. 490 (1949); and *Paris Adult Theatre I v. Slaton,* 37 L. Ed. 2d 446 (1973).

In *Kingsley Books* the Supreme Court specifically used the term "prior restraint" and stated:

> The judicial angle of vision in testing the validity of a statute like [the New York obscenity statute] is "the operation and effect of the statute in substance." [*Near v. Minnesota,* 283 U. S. 697, 713.] The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind this phrase has thus been authoritatively put by one who brings weighty learning to his support in constitutionally protected liberties: "What is needed," writes Professor Paul Freund, "is a pragmatic assess-

ment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis." The Supreme Court and Civil Liberties, Vand. L. Rev. 533, 53 [354 U. S. 436, 441-42].

In *Giboney* the Supreme Court upheld an injunction preventing the dissemination of truthful information by means of peaceful picketing. See 336 U. S. at 497-98. In *Hughes v. Superior Court,* 339 U. S. 460 (1949) the Court upheld an injunction against peaceful picketing which did not violate any specific statute, though it violated public policy. Intimidation of voters by government employees, similar to speech inducing or promoting a restraint on trade, has never been considered constitutionally protected speech and has always been contrary to public policy. Recently, the Supreme Court has indicated that a wide range of political conduct by government employees, on or off duty, is not "protected speech," but is "manifestly subject to state regulation." *Broadrick v. Oklahoma,* 37 L. Ed. 2d 830, 842 (1973). Accord, *United States Civil Service Commission v. National Association of Letter Carriers,* 37 L. Ed. 2d 796 (1973).

The *Giboney* holding was not limited to picketing, but to any course of conduct which has both speech and nonspeech components. 336 U. S. at 502. The trial court in *Giboney* did not simply enjoin the carrying of specific signs or the mouthing of specific epithets which were placed before the Court, but banned picketing entirely. 336 U. S. at 494.

In *Paris Adult Theatre I,* the trial court first imposed an ex parte injunction against taking the allegedly obscene film out of the jurisdiction (37 L. Ed. 2d 446) thus restraining the distributors' freedom to disseminate it before any adversary hearing. In that case, as well as its companion

case, *Miller v. California*, 37 L. Ed. 2d 419 (1973), the Supreme Court greatly broadened and expanded the category of obscenity and opened a wider range of speech and expression to state sanction. The Court in *Paris Adult Theatre I* reaffirmed its earlier line of cases in holding that this sanction can be applied by means of prior restraint as well as by subsequent sanction. 37 L. Ed. 2d 446, 455-56.

The plaintiffs have made no response to the defendants' argument that the doctrine of prior restraint was developed and applied to prevent governmental interference with the means of public mass communication, a consideration not present in the instant case.

Nor do the plaintiffs deal with or mention the crucial issues raised in the defendants' citation of the *Letter Carriers* case, 37 L. Ed. 2d 796, 808:

> The government has an interest in regulating the conduct and the "speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." [*Pickering v. Board of Education*, 391 U. S. 563, 568 (1968)]. Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.

The Court went on to say that:

> Neither the right to associate nor the right to participate in political activities is absolute in any event.

Rosario v. Rockefeller, — U. S. —, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973); *Dunn v. Blumstein*, 405 U. S. 330, 336, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972); *Bullock v. Carter*, 405 U. S. 134, 140-141, 31 L. 2d. 2d 92, 92 S. Ct. 849 (1972); *Jenness v. Fortson*, 403 U. S. 431, 29 L. Ed. 2d 554, 91 S. Ct. 1970 (1971); *Williams v. Rhodes*, 393 U. S. 23, 30-31, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968). (37 L. Ed. 796, 810 (1973)).

The above quoted excerpts from the *Letter Carriers* case makes clear that when a restraint serves a significant governmental interest, it is valid and must be enforced. As the Supreme Court noted recently in the same case, the government's legitimate interests and powers as an employer extend beyond prohibiting outright coercion or electioneering *after* it has occurred:

> [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they *appear* to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent.
>
> It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to his job and his political acts and beliefs it is not enough merely to forbid one employee from *attempting* to influence or coerce another. (37 L. Ed. 2d 796, 809, Emphasis supplied).

Although the plaintiffs impliedly admit that the Hatch Act is a prior restraint on speech, they argue that the cases upholding it do not apply to the instant case. With this,

we do not agree. Prospective governmental employees have a choice: They can either sign the Hatch Act pledge and agree not to participate in political activities in partial consideration for their employment, or they can refuse to sign the Hatch Act pledge and remain free to be politically active, but by so doing lose their opportunity to become government employees. They cannot, in any event, work for the government on their own terms. See the *Letter Carriers* case and *Adler v. Board of Education of the City of New York*, 342 U. S. 485, 492 (1951):

> It is clear that [government employees and government job applicants] have the right under our law to assemble, speak, think and believe as they will. *American Communications Asso. C. I. O. v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674. It is equally clear that they have no right to work for the state in the school system on their own terms. *United Public Workers v. Mitchell*, 330 U. S. 75, 91 L. Ed. 754, 67 S. Ct. 556. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.

Each of the plaintiffs in the instant case signed the Hatch Act pledge when he or she became an employee of the Philadelphia Housing Authority, and each agreed not to participate actively in political campaigns. At that time, each gave up his or her right to work for partisan causes and chose, instead, to work for the Philadelphia Housing Authority. In the instant case, they were again asked to make the same choice, i.e. to work for the Philadelphia Housing Authority and not to interfere or campaign in the upcoming Resident Advisory Board election, or to "go else-

where." They made their choice when they refused to sign the pledge. It was this act that caused their termination.

The plaintiffs now contend that although the purpose and scope of the restraint imposed in the instant case are constitutional, the manner in which it was imposed, i.e., by asking the plaintiffs to sign the memorandum as a condition precedent to future employment, makes it an impermissible prior restraint. But, insofar as the Philadelphia Housing Authority employees are concerned, the method of enforcement of the Hatch Act, and the restraint which was imposed in this case, are not merely similar but *identical.* As a condition precedent to employment, a prospective employee must sign a pledge which embodies the restrictions imposed by the Hatch Act, and concludes "I have read the above and understand that as an employee of the Philadelphia Housing Authority I must abide by these restrictions on political activity." The plaintiffs herein signed that pledge without protest.

The restraint imposed in this case could not be ruled invalid without also invalidating the restraints which the Hatch Act imposed on Federal employees. Both were imposed in exactly the same manner and for exactly the same purpose.

The plaintiffs have argued that (1) by the time they were fired, there was no election scheduled, and (2) the defendants Gilbert Stein and the Philadelphia Housing Authority violated their own memorandum by "blasting" the Resident Advisory Board in "The Good Neighbor" issued on March 2, 1973. It is clear from the record that the Resident Advisory Board election, which had been scheduled to take place at the time the plaintiffs were terminated, had been postponed, not cancelled (N. T. p. 147).

With regard to the plaintiffs' second argument, the record shows that the defendant Stein had left the employ of the Philadelphia Housing Authority before March 2,

1973, and had, in evey way, adhered to the proscriptions in the memorandum which he had issued and signed (N. T. pp. 138, 162).

As noted in the defendants' opening brief, the purpose of the memorandum and the Philadelphia Housing Authority's interest served by it were the preservation of the constitutional rights of the tenants of the Philadelphia Housing Authority to freedom of expression and freedom of association, the prevention of violence of the type which had occurred in the past, the maintenance of impartiality and the appearance of impartiality, which the Philadelphia Housing Authority is legally obliged to maintain, and the prevention of a dissipation of efforts which would occur if Philadelphia Housing Authority employees were allowed to campaign when they should be working. The fear of interference by Philadelphia Housing Authority employees was not groundless. This fear was pressed and brought to light in the suit before Judge Weiner initiated by the Resident Advisory Board. As a result of this fear, on both the part of the Philadelphia Housing Authority and the Resident Advisory Board, the Philadelphia Housing Authority and the Resident Advisory Board entered into a stipulation, and Judge Weiner issued an Order on May 9, 1973, which largely repeated the instruction which Gilbert Stein earlier gave the plaintiffs in his memorandum. If we held that memorandum an unconstitutional restraint on speech, we would, in effect, be forced to conclude that the Order of Judge Weiner was unconstitutional and unlawful. That obviously was not the case. Judge Weiner recognized the need for impartiality and non interference with the election by the Philadelphia Housing Authority and its employees, and he therefore issued his Order of May 9, 1973.

The plaintiffs have testified that they did not intend to campaign or interfere with the election. Yet they refused

to sign the memorandum which this Court has already held to be clear on its face, and neither vague nor overbroad. Thus, the plaintiffs' purely hypothetical and academic interest in launching a broadside attack on what they believe to be an unconstitutional memorandum must be balanced against the interests set forth above which were clear and obvious to the Philadelphia Housing Authority, the Housing Authority's officers, the Resident Advisory Board (with which the plaintiffs have been closely associated), and Judge Weiner, and which were interests of the type which the United States Supreme Court has repeatedly held to be valid and compelling.

CONCLUSIONS OF LAW.

1. Jurisdiction over the Philadelphia Housing Authority is proper under 28 U. S. C. A. § 1343(3) and (4), 42 U. S. C. A. § 1983, and the First and Fourteenth Amendments to the United States Constitution.

2. Jurisdiction over the individually named defendants is proper under 28 U. S. C. A. § 1343(3) and (4), 42 U. S. C. A. § 1983, and the First and Fourteenth Amendments to the United States Constitution.

3. This is an appropriate case for declaratory and injunctive relief, as well as for the award of back pay.

4. The defendants in this action are state officers, and the Philadelphia Housing Authority is a public agency, all acting under color of state law and involving "state action" within the purview of 42 U. S. C. A. § 1983 and the Fourteenth Amendment to the United States Constitution.

5. The plaintiffs in this action refused to sign a document, proffered them by the defendants, by which they would agree in advance to limit their right to speak, a right

guaranteed the plaintiffs against unreasonable invasion by the state under the First and Fourteenth Amendments to the United States Constitution.

6. The plaintiffs were employees of a public agency, the Philadelphia Housing Authority.

7. Since the plaintiffs engaged in no actual conduct that in any way adversely affected any interest of the Philadelphia Housing Authority, their dismissal was solely because they would not agree, in advance, to limit their speech.

8. The Philadelphia Housing Authority's discharge of the plaintiffs represented a reasonable exercise by the Housing Authority of its constitutionally permitted authority as a public employer.

9. The discharge of the plaintiffs did not violate § 1983 of Title 42 of the United States Code, nor did the discharge of the plaintiffs violate their rights as secured to them by the First and Fourteenth Amendments to the United States Constitution.

10. The defendants acted to preserve the vital governmental interest of efficiency, impartiality, and non interference in an upcoming and critical tenants' representative election.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL JUDGMENT.

AND Now, to wit, this 24th day of September, 1973, it is Ordered that judgment be and the same is hereby entered in favor of defendants Philadelphia Housing Authority, Gilbert Stein, Thomas J. Kelly, Thomas McIntosh, James Knowland, Carmelita Larner, Frosteena Kee, and William Rafsky, and against plaintiffs Brenda Alderman, Floyd Smith, Jerri Williams, and Kay Deming, together with costs.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER.
Clarence C. Newcomer, *J.*

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA OF MAY 15, 1973.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 73-766.

BRENDA ALDERMAN, ET AL.,

v.

THE PHILADELPHIA HOUSING AUTHORITY, ET AL.
MEMORANDUM AND ORDER.

NEWCOMER, *J.* May 15, 1973

Presently before the Court is the defendants' motion to dismiss the plaintiffs' complaint, or in the alternative, defendants' motion for summary judgment. After careful consideration of the defendants' brief in support of their motion, and the plaintiffs' brief in opposition of the motion, the Court will enter the following Order:

ORDER.

AND NOW, to wit, this 15th day of May, 1973, it is Ordered that the defendants' motion to dismiss the plaintiffs' complaint, or in the alternative, for summary judgment as that motion relates to the defendants' discharge of the plaintiffs as being a reasonable exercise of proper authority and not violative of the plaintiffs' rights to freedom of speech is DENIED, as the defendants' motion to

dismiss the plaintiffs' complaint, or in the alternative, for summary judgment, relates to the memorandum in question as being neither vague nor over-broad nor violative of any constitutional right is GRANTED, and as the defendants' motion to dismiss the plaintiffs' complaint, or in the alternative, for summary judgment relates to the defendants' discharge of the plaintiffs as not being unlawful for failure to give a prior hearing is GRANTED.

It is further Ordered that a full and final evidentiary hearing will be held at 9:00 a.m. on Friday, May 18, 1973, in Courtroom No. 9, on plaintiffs' motion for a declaratory judgment that their firings were in violation of their right to freedom of speech as guaranteed and protected by the First Amendment of the United States Constitution and the Civil Rights Act of 1871, Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13, 42 U. S. C. 1983, and on plaintiffs' motion for a permanent injunction compelling the defendants to rescind the plaintiffs' firings, and to restore them to their former employment with back pay at six per cent interest, and seniority retroactive to the dates of their firings.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER.
Clarence C. Newcomer, *J.*

SUPREME COURT, U. S.

AUG 6 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-2002.

THE PHILADELPHIA HOUSING AUTHORITY, GILBERT STEIN and THOMAS J. KELLY, Individually and in Their Capacity as Past and Present Executive Directors of The Philadelphia Housing Authority; THOMAS McINTOSH, JAMES NOLAN, CARMELITA LARNER, FROSTEENA KEE, and WILLIAM RAFSKY, Individually and in Their Capacity as Members of The Philadelphia Housing Authority,

Petitioners,

v.

BRENDA ALDERMAN, FLOYD SMITH, JERRI WILLIAMS, and KAY DEMING,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-2002.

THE PHILADELPHIA HOUSING AUTHORITY, GILBERT STEIN AND THOMAS J. KELLY, INDIVIDUALLY AND IN THEIR CAPACITY AS PAST AND PRESENT EXECUTIVE DIRECTORS OF THE PHILADELPHIA HOUSING AUTHORITY; THOMAS McINTOSH, JAMES NOLAN, CARMELITA LARNER, FROSTEENA KEE, AND WILLIAM RAFSKY, INDIVIDUALLY AND IN THEIR CAPACITY AS MEMBERS OF THE PHILADELPHIA HOUSING AUTHORITY,

Petitioners,

v.

BRENDA ALDERMAN, FLOYD SMITH, JERRI WILLIAMS, AND KAY DEMING,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

I. OPINIONS BELOW.

The opinion of the District Court is reported at 365 F. Supp. (E. D. Pa. 1973). The opinion of the Court of Appeals is reported at 496 F. 2d 164 (3rd Cir. 1974).

II. QUESTIONS PRESENTED.

The Questions Presented by the petitioners substantially miscast the issues raised by the facts of this case. This is not a lawsuit involving the abstract power of a governmental employer "to restrict its employees' political activity and campaigning . . ." (Pet. at 3). Rather, it is a case involving the question of whether the particular means used to limit the speech of governmental employees, i.e. by use of a prior restraint, was constitutional. The Court of Appeals specifically found it was not. Therefore, the following questions are presented:

1. Whether the summary dismissals of the four respondents for refusing to sign a Memorandum which required them to agree, in advance, to totally limit their speech about an important issue was a prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution?

2. Whether the scope and terms of the Memorandum which the respondents refused to sign were so substantially overbroad and vague as to violate the First and Fourteenth Amendments to the United States Constitution?

3. Whether the refusal of a governmental employer to afford its permanent-status employees either a prior or post-termination evidentiary hearing at which the employees could contest their discharges was a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

III. COUNTER-STATEMENT OF THE FACTS.

Significantly omitted from the petitioners' version of the facts of this case, yet critical to it, are seven facts which illumine the unfairness and selective manner in which the respondents were summarily discharged from their jobs at the Philadelphia Housing Authority ("PHA"). Set forth below, each of these facts are undisputed, having been proved during the proceedings which were conducted in the District Court.

A. The Respondents Were Permanent-Status Employees of PHA.

PHA is a public agency whose legislative purpose is to provide safe and sanitary housing for the public housing tenants of Philadelphia.[1] Although it has no formal tenure system for its employees, PHA has established a complex merit system of employment which grants numerous rights and benefits to those of its employees who have completed a mandatory three-month probationary period.

Each of the respondents successfully completed that probationary period and thus attained "permanent status" employment at PHA (FF 8, Pets.' App. A28). As a result, they acquired specified rights in their jobs. Included among them were rights to reinstatement, to life insurance benefits, to vacation and sick leave, to leaves of absences, to layoff preference and to a retirement pension plan.[2] To

1. Housing Authorities Act of May 28, 1937, Pa. Stat. tit. 35, § 1541 *et seq.*

2. Furthermore, the respondents, during their employment, had two other rights of permanent-status employment—the right to dismissal for cause only and for evidentiary appeals to challenge their dismissals. These rights, however, were summarily suspended by Gilbert Stein, the Executive Director of PHA, because he demanded "a total free hand to move personnel around . . . to dismiss people . . . without having to be restricted in any way" (*see* the Appendix prepared for the appeal in the Third Circuit Court of Appeals at 363A).

both the respondents and PHA, therefore, there clearly existed an objective expectancy that the respondents' employment was both continuous and open-ended.

B. The Respondents Had Compelling Reasons for Not Signing the Stein Memorandum.

The four respondents were summarily discharged from their jobs in the last days of 1972 and the first days of 1973 (FF 48, 58, 69, 79, Pets.' App. 38a-42a). Each was fired for failing to sign the following Memorandum, authored by PHA's then Executive Director, Gilbert Stein:

> No PHA employee shall engage in any form of interference during the upcoming tenant plebiscite to determine whether residents of the PHA-managed properties want to be represented by the RAB Corporation.
>
> * * *
>
> It is the policy of this authority to encourage all tenants to exercise their right to choice . . . but there should be no attempt by PHA employees to discuss RAB politics with tenants, either pro or con.
>
> Any employee who engages in such activity will be subject to immediate dismissal.
>
> /s/ GILBERT STEIN
>
> * * *
>
> I have read the above and understand that as an employee of the Philadelphia Housing Authority, I must abide by this restriction.
>
> .....
> Employee's Signature

(Pets.' App. A3-A4)

Each of the respondents refused to sign this Memorandum because they believed it to be a prior restraint on their freedom of speech (Pets.' App. A67-A68). Each, however, had additional reasons for not signing. Respondents Alderman and Williams were themselves public housing tenants hired, in part, pursuant to a federal policy affording preference in employment to public housing tenants.[3] Each was unsure whether the Stein Memorandum prohibited them from discussing the proposed tenant plebiscite with their families, friends or neighbors. Respondent Smith had also lived in public housing at one time, still had many friends who were tenants there, and was confused as to whether he could answer questions his friends might have about the election. Respondent Deming was a professional social worker at PHA. Part of her responsibilities included discussions and advice to public housing tenants about their living conditions. She was uncertain whether the Memorandum prevented her from even recommending to a tenant-client that he or she ought to seek assistance for their problem from the Resident Advisory Board ("RAB").

C. PHA Failed to Afford the Respondents Any Hearing at Which They Could Contest Their Discharges.

Neither petitioners Gilbert Stein nor PHA itself issued any guidelines or regulations clarifying or interpreting the Stein Memorandum. In addition, neither provided PHA employees with any mechanism by which they could request or receive advisory opinions concerning the meaning and scope of the prohibitions contained in the Memorandum.

To the contrary, each respondent unsuccessfully attempted to obtain a clarification of those prohibitions. They wrote letters, to which they received no response; they re-

3. The National Housing Act, as amended August 1, 1968, 12 U. S. C. § 1701(u).

quested meetings, which were either not held or at which no discussion of the Memorandum was allowed; and they asked questions, which were not answered. Instead, they were summarily discharged without even the benefit of either a prior or post-termination hearing at which to contest their firings.

D. There Is No Evidence Supplying Any Factual Justification for the Stein Memorandum.

Stein issued his Memorandum because he "felt certain" that it was necessary to prevent interference with the election (FF 17, Pets.' App. A30). But the record is totally devoid of any evidence which could even arguably support Stein's subjective impressions. Prior to the issuance of the Memorandum, neither Stein nor PHA could point to any known incident of PHA employees discussing the then pending election or interfering with it. There is no evidence that any PHA employee attempted to influence, coerce or persuade tenants with respect to the election. There is no evidence of complaints by tenants even alleging such interference. There is no evidence with respect to confrontations, violent or otherwise, between members of RAB and employees of PHA in any manner relating to the election. There is no evidence that any PHA employee failed to devote his energy to his regular duties because of the pending election. As the Court of Appeals observed, the issuance of this Memorandum can be traced only to a "relatively spontaneous decision" of Mr. Stein (Pets.' App. A18).

E. Other PHA Employees Failed to Sign the Stein Memorandum But Were Not Discharged From Employment.

The Stein Memorandum was distributed to PHA employees in November, 1972 and was to be signed and re-

turned to Ms. Karen Vandenhengle, an employee in PHA's personnel department (FF 22, Pets.' App. A33-A34). Ms. Vandenhengle's records revealed that 65 to 70 employees failed to sign the Memorandum and, except for the four respondents, all of those 65 to 70 employees remained employed at PHA and were not disciplined in any way for not signing it (FF 23, Pets.' App. A34). Furthermore, of those 65 to 70 employees, only about 14 ever gave "reasons" for not signing the Memorandum. But, even for these 14, Ms. Vandenhengle was unable to explain why they had not signed by the time she testified in court (over five months after the Memorandum was due). Moreover, nothing in the Memorandum excused any employee for not signing.

F. None of the Respondents in Any Way Violated the Prohibitions of the Stein Memorandum.

It is undisputed that the four respondents did not discuss the proposed RAB election, nor RAB politics, nor did they interfere in any manner with the election. The District Court so found (FF 26, Pets.' App. A34) and in its Conclusions of Law ("C. L.") wrote:

> Since the plaintiffs engaged in no actual conduct that in any way adversely affected any interest of the Philadelphia Housing Authority, their dismissal was solely because they would not agree, in advance, to limit their speech. (C. L. 7, Pets.' App. A68).

G. The Petitioners Themselves Violated the Restraints Imposed by the Stein Memorandum.

While it is conceded that the respondents in no way violated the Stein Memorandum, the same cannot be said of the petitioners. Using the most effective means at their disposal, they published an article in PHA's official news-

paper, "The Good Neighbor," which accused the RAB of being "fat", "happy", "irresponsible" and intent upon "subverting the democratic process." The article was entitled "Report to the People of Philadelphia" and was authored by petitioner Gilbert Stein on the occasion of his resignation from the position of Executive Director of PHA.

The article was published on March 2, 1973, just two months after the respondents' dismissals. It was mailed directly to all public housing tenants in Philadelphia. Although the article was an unmistakable violation of the Stein Memorandum, dropping even the supposed appearance of impartiality which PHA now strives to recreate, no one at PHA responsible for its publication was discharged or even disciplined for their actions. Had PHA been so zealously concerned about neutrality in the proposed election, it would hardly have published Mr. Stein's vituperative attack against RAB.

IV. REASONS FOR DENYING THE WRIT.

Although the petitioners have artfully avoided analyzing this case in terms of "prior restraint", their evasion of that issue cannot conceal its central presence in this litigation. The issue is not, as petitioners would lead this Court to believe, whether PHA had the power to limit the speech and political activity of its employees. That is an abstract issue not presented in the courts below. Rather, the issue is whether the dismissals of the respondents for not agreeing, in advance, to totally limit their freedom of speech was a prior restraint in violation of the first amendment. Having approached the case in that context, the Court of Appeals entered an Opinion and Judgment in favor of the respondents.

A. The Decision Below Is Correct.

None of the respondents, indeed not one PHA employee, was discharged from his or her job because they "interfered" with the scheduled (but never held) tenant election or because they discussed "RAB politics" with any tenant. The petitioners have never claimed otherwise. Instead, the four respondents were fired for not *signing* a Memorandum which forbade *all* discussion by them of the RAB plebiscite. Their discharges, therefore, present the classic example of the imposition of a prior restraint upon speech. Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemporary Problems, 648, 655-660 (1955).

Over the years, this Court has repeatedly condemned similar prior restraints upon speech, and has required, instead, the application of subsequent penalties to the conduct alleged to be unprotected by the First Amendment. *See, e.g., New York Times, Inc. v. United States,* 403 U. S. 713

(1971); *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971); *Near v. Minnesota*, 283 U. S. 697 (1931). In each of these decisions, the Court has reiterated the proposition, expressed by Mr. Chief Justice Hughes in *Lovell v. Griffin*, 303 U. S. 444, 451-452 (1938), that the elimination of prior restraints was a "leading purpose" behind the first amendment's adoption in 1791.

Consistent with that statement, the Court has held that: "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1962). Applying that standard of review, the Court has not sanctioned even one prior restraint on speech colorably protected by the First Amendment.

Against this array of caselaw, and in an attempt to meet their "heavy burden", the petitioners strain to justify the Stein Memorandum and the dismissal of the respondents for not signing it on the attenuated theory that PHA felt compelled to prevent its employees from interfering in the tenant election. For several reasons, that argument is fallacious.

First, the petitioners never introduced any evidence indicating that any PHA employee, prior to the issuance of the Stein Memorandum, spoke out with respect to the proposed election, interfered with it, discussed it with public housing tenants, or even intended to do any of these things. Nor was there any evidence that any public housing tenant felt influenced, coreced or intimidated by PHA employees. In fact, all of the evidence was to the contrary. The only evidence the petitioners could adduce to support the prior restraint imposed by the Memorandum was Gilbert Stein's fear that PHA's employees might interfere with the election. To a similar argument, Mr. Justice Brandeis once wrote:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of free speech to free men from the bondage of irrational fears. *Whitney v. California*, 274 U. S. 357, 376 (1927) (concurring opinion).

Second, if the RAB election was the alleged reason for the Stein Memorandum, its function in that regard was vitiated by the fact that it was cancelled on December 11, 1972 as a result of a Stipulation executed in court between PHA and RAB. The cancellation preceded the respondents' dismissals. To this day, no tenant plebiscite of any kind has been held by PHA.

Third, the Stein Memorandum was selectively and discriminatorily enforced. On the one hand, PHA summarily dismissed the four respondents for not signing the Memorandum yet, on the other, it failed to discharge, much less discipline, 65 to 70 other employees who also failed to sign it. In addition, PHA itself and Gilbert Stein as its Executive Director, published an article, distributed to all public housing tenants, accusing the Resident Advisory Board of being "fat", "happy", "irresponsible" and intent upon "subverting the democratic process." This is censorship of classic proportions. *See Staub v. Baxley*, 355 U. S. 313 (1958); *Cf. Police Department v. Mosley*, 408 U. S. 92, 96 (1972). As such, "[i]t is clearly unconstitutional [because it] enable[d] a public official to determine which expressions of view will be permitted and which will not . . ." *Cox v. Louisiana*, 379 U. S. 536, 557 (1965).

Finally, petitioners enforced this censorship system in a procedurally arbitrary manner. They refused to afford the respondents either a prior or post-termination hearing at which they could contest their firings. This too

rendered the dismissals unconstitutional because a "non-criminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Carroll v. President and Commissioners of Princess Anne,* 393 U. S. 175, 181 (1968).

B. The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court.

Straining for support for the grant of the Writ, the petitioners argue that this Court's decisions in *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U. S. 549 (1973), *Broadrick v. Oklahoma,* 413 U. S. 601 (1973) and *Arnett v. Kennedy,* — U. S. —, 40 L. Ed. 2d 15 (1973) conflict with the decision below of the Court of Appeals. Not only is this incorrect, but these cases actually support the position of the respondents.

First, none of them are prior restraint cases. *Letter Carriers and Broadrick* were, respectively, attacks upon the constitutionaltiy of section 9(a) of the Hatch Act, 5 U. S. C. § 7324(a)(2) which prohibits federal employees from taking "an active part in political management or political campaigns", and an Oklohoma statute similarly worded. *Arnett* involved the dismissal of a federal employee for making defamatory remarks about his superiors. In each case, the employees were subsequently disciplined for having done what was prohibited by the statutes or regulations involved. They were not, however, fired for refusing to sign a pledge requiring total silence on a matter of social and political importance. In fact, in *Broadrick* the Court specifically distinguished cases where political conduct "has required official approval under laws that delegated standardless discretion to local fune-

tionaries, resulting in virtually unreviewable *prior restraints* on First Amendment rights." 413 U. S. at 613 (emphasis added).

Second, the Hatch Act is narrowly drawn. It prohibits only active participation in political management or campaigns, while specifically acknowledging the rights of employees to "express [their] opinion on political subjects and candidates." 5 U. S. C. § 7324(b). The Court has consistently stated that this exception saves the Act from unconstitutionality. *Letter Carriers,* 413 U. S. at 575-6 and *United Public Workers v. Mitchell,* 330 U. S. 75, 100 (1947). The Stein Memorandum, on the other hand, seeks to censor all speech, even the most private, with respect to a political issue of considerable importance.[4] In other words, it does precisely that which Congress refrained from doing in the Hatch Act.

Third, unlike the Stein Memorandum, the Hatch Act was supported by compelling evidence of harm to the governmental structure. Before the court were detailed findings of Congress on the evils of the spoils system, dating as far back as the Jefferson administration. *Letter Carriers,* 413 U. S. at 564-567. By contrast, and as noted by the Court of Appeals, nothing in this record shows "that there were any deliberations (extended or otherwise) before the issuance of the memorandum . . ." (Pets.' App. A18, n. 56). Consequently, unlike the deference accorded Congress in *Letter Carriers,* no such deference should be accorded Mr. Stein, a non-elected administrator who is unaccountable to the electorate. *See Bridges v. California,* 314 U. S. 252, 260-261 (1941).

4. This supports an independent attack on the grounds of substantial overbreadth. Alternatively, if the Stein Memorandum does not mean what it says, it is void for vagueness. Stein testified that his own attack against RAB in the "Good Neighbor" was not prohibited by the Memorandum. If this is so, the Memorandum is indecipherable.

Finally, the statutes and regulations sustained in *Letter Carriers, Broadrick* and *Arnett* had procedural protections not present in the Stein Memorandum. Both the Civil Service Commission (in *Letter Carriers* and *Broadrick*) and the Office of Economic Opportunity (in *Arnett*) had (a) issued detailed regulations defining the range of forbidden activities, (b) established a procedure by which they would give an opinion with respect to a proposed course of conduct, (c) provided evidentiary hearings for disciplined employees and (d) did not act selectively or arbitrarily. The petitioners respected none of these principles in issuing and enforcing the Stein Memorandum.

Based upon these factors, the Court of Appeals distinguished *Letter Carriers* and *Broadrick*. For the same reasons, *Arnett* is distinguishable. All three, therefore, support and do not conflict with the decision below.

C. The Court of Appeals Did Not Decide Any Procedural Due Process Issue.

Because the Court of Appeals decided this case on the issue of prior restraint only, it was unnecessary for it to reach, and it did not reach, respondents' claims that they had Fourteenth Amendment "property interests" in their jobs. That issue, as well as the related claim that respondents were entitled to evidentiary hearings to contest their dismissals, are not therefore properly before this Court.

While conceding this, the petitioners strenuously contend that the Judgment of the Court of Appeals exceeds the scope of its Opinion because the Judgment reverses the May 15, 1973 Order of the District Court which granted the petitioners' motion to dismiss the respondents' due process claims. Even if this were so, it most likely is a technical error. Certainly, the petitioners could have moved

the Court of Appeals to amend its Judgment. Having failed to pursue that obvious approach, the petitioners have raised a contrived and unnecessary argument as a basis for the issuance of the Writ.

However, even assuming *arguendo* that the Court of Appeals reached the due process issue, the petitioners incorrectly conclude that its decision conflicts with Pennsylvania law with respect to whether the respondents had "property interests" in their jobs. *Cf. Board of Regents v. Roth,* 408 U. S. 564, 577 (1972). First, repeated decisions of the Pennsylvania Supreme Court reaffirm the principle that governmental workers are employed at will *unless* the legislature has conferred upon the employing agency the power to enter into contracts of employment with them. *See,* e.g., *American Federation of State, County, and Municipal Employees v. Shapp,* 433 Pa. 527, 280 A. 2d 375, 377 (1971) and *Scott v. Philadelphia Parking Authority,* 402 Pa. 151, 166 A. 2d 278, 282 (1960).

Here, since 1937 the Pennsylvania legislature has granted the Philadelphia Housing Authority the power to hire "permanent or temporary" employees as it may need and desire. Pa. Stat. tit. 35, § 1547. Pursuant to that legislative authority, the respondents were initially hired as "probationary employees" of PHA, and, after a review of their probationary performance, they were granted "permanent employee" status. As such, they acquired specific rights in their jobs not granted to probationary employees (*see* III A, *supra*). These rights created an "objective", as opposed to a "unilateral" expectation of continued employment at PHA. Accordingly, the respondents were invested with fourteenth amendment property rights as required by *Roth, supra,* 408 U. S. at 578.

Second, *Roth* and its companion case, *Perry v. Sinderman,* 408 U. S. 593 (1972) hold that governmental em-

ployees are entitled to some form of evidentiary hearing, regardless of their employment status, if they are deprived of an interest protected by the first amendment. *Roth,* 408 U. S. at 569-570, *Perry,* 408 U. S. at 699. This is exactly the sort of procedural protection which PHA failed to afford the respondents. That failure further infects the respondents' dismissals with unconstitutionality. *Cf. Connell v. Higginbotham,* 403 U. S. 207, 208 (1971).

V. CONCLUSION.

While any case involving the first amendment presents conceptually significant issues, this case is *sui generis* and not worthy of review in this Court. We know of no reported case in which a governmental agency has imposed the kind of prior restraint on its employees which PHA imposed upon the respondents. The petitioners have not cited any to compare with it. Furthermore, Mr. Stein is no longer with PHA; his aberrent behavior is unlikely to be repeated; and the specific election with which his Memorandum dealt was cancelled long ago.

It is respectfully submitted, therefore, that the petition For Writ of Certiorari should be denied.

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